No. 88-1685-CFX
Status: GRANTED

Title: National Labor Relations Board, Petitioner
v.
Curtin Matheson Scientific, Inc.

Docketed:
April 17, 1989

Court: United States Court of Appeals
for the Fifth Circuit

Counsel for petitioner: Solicitor General, Nelson,Eric H.

Counsel for respondent: Carroll III,James V.

Entry	Date	Note	Proceedings and Orders
1	Mar 7 1989	G	Application (A88-707) to extend the time to file a petition for a writ of certiorari from March 22, 1989 to April 21, 1989, submitted to Justice White.
2	Mar 8 1989		Application (A88-707) granted by Justice White extending the time to file until April 21, 1989.
3	Apr 17 1989	G	Petition for writ of certiorari filed.
5	May 4 1989		Order extending time to file brief of respondent on the merits until June 5, 1989.
6	Jun 6 1989		DISTRIBUTED. June 22, 1989
7	Jun 8 1989	X	Brief of respondent Curtin Matheson Scientific, Inc. in opposition filed.
8	Jun 9 1989	X	Reply brief of petitioner NLRB filed.
9	Jun 26 1989		Petition GRANTED.
			**********
11	Aug 1 1989		Order extending time to file brief of petitioner on the merits until September 2, 1989.
12	Sep 1 1989		Record filed.
		*	Certified copy of original record and proceedings, box, received.
14	Sep 1 1989		Brief of petitioner NLRB filed.
13	Sep 2 1989		Brief amicus curiae of AFL-CIO filed.
15	Sep 6 1989		Joint appendix filed.
17	Sep 14 1989		Order extending time to file brief of respondent on the merits until October 17, 1989.
18	Sep 26 1989		SET FOR ARGUMENT MONDAY, DECEMBER 4, 1989. (1ST CASE)
19	Oct 17 1989		Brief of respondent filed.
20	Oct 17 1989		Brief amicus curiae of Manville Corporation filed.
21	Oct 17 1989		Brief amicus curiae of Chamber of Commerce of the United States filed.
22	Oct 25 1989		CIRCULATED.
23	Nov 15 1989	X	Reply brief of petitioner NLRB filed.
24	Dec 4 1989		ARGUED.

88-1685

No.

Supreme Court, U.S.
FILED
APR 17 1989
JOSEPH F. SPANIOL, JR.

In the Supreme Court of the United States

OCTOBER TERM, 1988

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

CURTIN MATHESON SCIENTIFIC, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Whether, in assessing the reasonableness of an employer's asserted doubt that an incumbent union enjoys continued majority support, the Board may refuse to apply any presumption regarding the extent of union support among replacements for striking employees.

PARTIES TO THE PROCEEDINGS

In addition to the parties identified in the caption, the following union also appeared in the proceedings before the Board: General Drivers, Warehousemen and Helpers, Local 968, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO.

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No.

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

CURTIN MATHESON SCIENTIFIC, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Acting Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-24a), is reported at 859 F.2d 362. The decision and order of the National Labor Relations Board (App., *infra*, 25a-54a) are reported at 287 N.L.R.B. No. 35.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 55a) was entered on November 4, 1988, and a petition for rehearing was denied on December 22, 1988 (App., *infra*, 56a-57a). On March 8, 1989, Justice White extended the time within which to file a petition for a writ of certiorari to and including April 21, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 8(a)(1) and (5) of the National Labor Relations Act (NLRA), 29 U.S.C. 158(a)(1) and (5), provides:

> It shall be an unfair labor practice for an employer –
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
>
> * * * * *
>
> (5) to refuse to bargain collectively with the representative of his employees, subject to the provisions of section 159(a) of this title.

Section 7 of the NLRA, 29 U.S.C. 157, provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

STATEMENT

At the conclusion of an economic strike, the respondent employer, claiming a reasonable doubt that the incumbent union retained majority support among the bargaining unit employees, withdrew recognition from that union. The National Labor Relations Board (NLRB or Board) disagreed and issued a bargaining order. In assessing the reasonableness of respondent's position, the Board held that it would apply no presumption concerning the extent

to which the striker replacements hired by respondent supported the union. A divided court of appeals denied enforcement of the Board's order. In place of the Board's "no-presumption" rule, the court applied a presumption that striker replacements oppose the existing union. The Board seeks review of that decision, which presents an important and recurring question on which the circuits are divided.

1. Respondent is a Texas corporation that trades in laboratory instruments and supplies and maintains a warehouse in Houston. On April 15, 1970, the Board certified Local 968, General Drivers, Warehousemen and Helpers (the Union) as the collective bargaining agent for respondent's production and maintenance employees. On May 21, 1979,[1] the latest collective-bargaining agreement between the parties expired, and on May 25 the company made its final offer. The Union rejected that offer on May 29. A lockout of all 27 bargaining unit employees lasted from June 4 to June 12, when respondent renewed its offer of May 25. The Union again rejected it. App., *infra*, 2a-3a.

On June 13, the Union began an economic strike. Five of the 27 bargaining unit employees immediately crossed the picket line and returned to work. On June 17, respondent put into effect the wage schedule proposed in its May 25 offer. On June 25, with the strike still in progress, respondent hired 29 new employees to replace the 22 strikers; respondent contended that the additional seven employees were hired to compensate for the new workers' inexperience and to allow for attrition. App., *infra*, 3a.

On July 16, the Union ended its strike, offering unconditionally to accept the May 25 offer. On July 19, the Union asked respondent to execute a contract embodying

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[1] All dates given are in 1979 unless otherwise noted.

the May 25 terms. The following day, July 20, respondent notified the Union that the May 25 offer was unavailable. It also stated that because it entertained doubts about the Union's continued majority status, it was withdrawing recognition and refusing to bargain further. As of that date, the bargaining unit consisted of 19 employees who had participated in the strike and who had not been reinstated, 25 replacements, and five "crossover" employees who had crossed the picket line and were then working for the company. App., *infra*, 3a.

Also on July 20, the Union asked the respondent to furnish information regarding the total number of bargaining unit employees on the payroll, and the job classification and seniority of each of those employees. Respondent refused. App., *infra*, 3a-4a.

2. On July 30, the Union filed unfair labor practice charges with the Board, alleging violations of Section 8(a)(1) and (5) of the NLRA, 29 U.S.C. 158(a)(1) and (5), and on September 7, a complaint was issued. App., *infra*, 4a. The complaint was dismissed by the Administrative Law Judge, but was reinstated by the Board, which found that respondent lacked a reasonable doubt concerning the Union's majority status. *Id.* at 25a-54a. The Board explained that " '[a]bsent unusual circumstances, there is an irrebuttable presumption that a union enjoys majority status during the first year following its certification' " (*id.* at 32a (citation omitted)). Thereafter, the Board continued, "the presumption of majority status continues but may be rebutted" by the employer in one of two ways: "(1) by showing that on the date recognition was withdrawn the union did not in fact enjoy majority status, or (2) by presenting evidence of a sufficient objective basis for a reasonable doubt of the union's majority status at the time the employer refused to bargain" (*ibid.*). In the present case, the Board noted (*ibid.*), respondent sought to

establish the second line of defense. Rejecting that defense, the Board found that "the fact that 5 of the 27 unit employees crossed the picket line does not in itself support an inference that the 5 repudiated the Union as the collective-bargaining representative" (*ibid.*). It also explained (*id.* at 33a) that certain statements of particular employees did not clearly evidence disapproval of the Union.

Finally, relying on its decision in *Buckley Broadcasting Corp. of California d/b/a Station KKHI & National Association of Broadcast Employees & Technicians, Local 51,* (*Station KKHI*), 284 N.L.R.B. No. 113 (July 27, 1987), application for enforcement pending, No. 88-7106 (9th Cir. filed Mar. 7, 1988), the Board explained (App., *infra*, 33a) that it would not "use any presumptions with respect to the[] union sentiments" of the 25 striker replacements. The Board stated that it would "instead * * * take a case-by-case approach," requiring "additional evidence of a lack of union support on the replacements' part in evaluating the significance of this factor in the employer's showing of good-faith doubt" (*ibid.*). Applying that standard, the Board concluded that "[t]aking into account all the factors relied on by the Respondent to support its asserted reasonable doubt of the Union's majority status, * * * the evidence is insufficient to rebut the presumption of the Union's continuing majority status" (*id.* at 35a). It therefore held that respondent had violated Section 8(a)(1) and (5) by withdrawing recognition from the Union; by refusing to furnish the information that the Union had requested; and by refusing to execute the collective-bargaining agreement proposed by the Union on July 19 and embodying the terms previously offered by respondent on May 25 (*id.* at 35a-38a). The Board ordered the company to cease and desist; on request, to bargain with the Union and to execute an agreement based on the

May 25 terms; to furnish the requested information; and to post an appropriate notice (*id.* at 39a-42a).

3. The court of appeals denied enforcement by a divided vote, concluding that respondent had established a reasonable doubt of the Union's majority status (App., *infra*, 1a-24a). The court first noted (*id.* at 6a-8a) that several employees who crossed the picket line, and others who remained on the picket line, had expressed anti-union sentiments to respondent's director of employee relations. The court next rejected the Board's decision to apply no presumption regarding the preferences of the replacements. Citing prior Fifth Circuit case law, the court instead approved (*id.* at 9a & n.1) the so-called "Gorman presumption"—drawn from Professor Gorman's labor law text—according to which " 'it is generally assumed that [a replacement] does not support the Union and that he ought not to be counted toward a Union majority' " (*id.* at 9a n.1, quoting R. Gorman, *Labor Law* 112 (1976)). The court found that the Gorman presumption was warranted in this case because "a substantial percentage of the bargaining unit employees [was] replaced on the same day, and the striker replacements cross[ed] a picket line" (App., *infra,* 10a). The court also noted (*ibid.*) that both the First and Eighth Circuits had approved the Gorman presumption. Applying that presumption, the court held that "the Company is justified in counting the striker replacements as employees whom they doubt support the Union" (*ibid.*).

Judge Williams dissented (App., *infra*, 11a-24a). "The outcome of this case," he explained (*id.* at 12a), "turns on the significance attached to the hiring of permanent replacement workers during an economic strike." In his view, the Board had offered "compelling" reasons for adopting a rule according to which it would "refuse[] to presume that the replacement workers are for or against the union" (*id.* at 13a, 15a). Judge Williams noted that

the Board's approach permits it "to take into account the particular circumstances surrounding each strike and the hiring of replacements, while retaining the long-standing requirement that the employer must come forth with some objective evidence to substantiate his doubt of continuing majority status" (*id.* at 15a). Observing that "there is a conflict among the circuits" regarding which, if any, presumption should be applied (*id.* at 17a-18a), Judge Williams concluded that "[t]he refusal to attach any presumptive weight to the hiring of replacement workers is, at the very least, a reasonable policy choice which is not inconsistent with the National Labor Relations Act" (*id.* at 16a). Accordingly, he stated, "even if this Court prefers a different approach the only proper course is to enforce the Board's view because of the deference we are required to afford the Board's policy decisions" (*ibid.*). Applying the Board's no-presumption rule for replacements, Judge Williams would have enforced the Board's order requiring respondent to recognize and bargain with the Union (*id.* at 20a-24a).

REASONS FOR GRANTING THE PETITION

The question presented in this case is whether, in establishing a reasonable doubt of a union's majority status, an employer enjoys a presumption that permanent replacements for striking workers do not support the union. Relying on its prior decision in *Station KKHI,* the Board held in the present case that no such presumption should be applied. The no-presumption rule is plainly "rational and consistent" with the National Labor Relations Act and was therefore "entitled to deference from the courts." *Fall River Dyeing & Finishing Corp.* v. *NLRB,* 482 U.S. 27, 42 (1987). Nevertheless, the court of appeals rejected the Board's rule in favor of the so-called Gorman presump-

tion, according to which striker replacements are presumed to oppose the incumbent union. The court's decision misconstrues the no-presumption rule; it substitutes a contrary rule that lacks empirical or policy support; and it impermissibly second-guesses the Board's accumulated expertise in administering the statute. Moreover, as three Members of this Court noted in *Pennco, Inc.* v. *NLRB,* 459 U.S. 994 (1982) (White, J., dissenting from denial of certiorari), the circuits are divided on the question whether, and to what extent, presumptions are appropriate in assessing the union sentiments of striker replacements. Further review of the court of appeals' decision is therefore warranted.

1. a. "[A]fter a union has been certified by the Board as a bargaining-unit representative, it usually is entitled to a conclusive presumption of majority status for one year following the certification." *Fall River Dyeing,* 482 U.S. at 37. Accord *NLRB* v. *Burns International Security Services, Inc.,* 406 U.S. 272, 279 n.3 (1972); *Brooks* v. *NLRB,* 348 U.S. 96, 98-99 (1954). See also 29 U.S.C. 159(c)(3). "[A]fter this period, the union is entitled to a rebuttable presumption of majority support." *Fall River Dyeing,* 482 U.S. at 38; *Burns International,* 406 U.S. at 279 n.3. To rebut that presumption, an employer may show either (1) that the union did not in fact enjoy majority status, or (2) that there was a sufficient, objective basis for a reasonable doubt of the union's majority status.[2]

b. In the present case, respondent asserted a doubt that the Union retained majority support and on that basis

[2] See, *e.g., Whisper Soft Mills, Inc.* v. *NLRB,* 754 F.2d 1381, 1387 (9th Cir. 1984); *NLRB* v. *Pennco, Inc.,* 684 F.2d 340, 342 (6th Cir.), cert. denied, 459 U.S. 994 (1982); *NLRB* v. *Windham Community Memorial Hosp.,* 577 F.2d 805, 811 (2d Cir. 1978); *Retired Persons Pharmacy* v. *NLRB,* 519 F.2d 486, 489 (2d Cir. 1975). Cf. *Fall River Dyeing,* 482 U.S. at 41 n.8.

withdrew recognition. The question presented is whether, in evaluating the reasonableness of an employer's position, the Board must presume that striker replacements oppose the union.

In its 1987 decision in *Station KKHI,* the Board revised its approach to that question (App., *infra,* 58a-91a). The Board noted that in prior cases it had approved the "presumption * * * that permanent strike replacements hired during a strike support the union in the same ratio as the striking employees whom they replaced" (*id.* at 62a). The Board held, however, that "[a]s a matter of policy, there is no warrant for [that] presumption" (*id.* at 63a). Moreover, the Board stated, the presumption adopted in its prior cases had been "uniformly rejected" by the courts of appeals (*id.* at 72a) and lacked any "evidentiary or empirical basis" (*id.* at 74a). The Board therefore "carefully reviewed [its] past decisions and assessed [its] experience to determine if they suggest generalizations about the views of permanent strike replacements that are so universal that they support one overall presumption that can be applied when evaluating a union's majority status" (*ibid.*). The Board concluded that no such "universal" generalizations could be drawn. It therefore found "no basis for presuming that strike replacements who have accepted employment and are therefore willing to cross a picket line in order to go to work favor union representation" (*id.* at 75a).

Correspondingly, the Board found "the contrary presumption"—that "permanent replacements who cross a picket line * * * repudiate the union"—"equally unsupportable" (App., *infra,* 75a). It noted that a strike replacement "may be forced to work for financial reasons, or may disapprove of the strike in question but still desire union representation and would support other union initiatives" (*ibid.*). Apart from the fact that the contrary presumption

is "not factually compelling" (*ibid.*), the Board also observed that "adoption of this presumption would disrupt the balance of competing economic weapons long established in strike situations and substantially impair the employees' right to strike by adding to the risk of replacement the risk of loss of the bargaining representative as soon as replacements equal in number to the strikers are willing to cross the picket line" (*id.* at 75a-76a).

In short, the Board in *Station KKHI* "discern[ed] no overriding generalization about the views held by strike replacements and therefore * * * decline[d] to maintain or create any presumptions regarding their union sentiments" (App., *infra,* 76a). Instead, the Board held that it would henceforth "review the facts of each case" and "require 'some further evidence of union non-support' before concluding that an employer's claim of good-faith doubt of the union's majority is sufficient to rebut the overall presumption of continuing majority status" (*ibid.* (footnote omitted)).

c. The no-presumption rule adopted in *Station KKHI* and applied by the Board in the present case plainly is "rational and consistent with the Act" and was therefore "entitled to deference" from the court of appeals. *Fall River Dyeing,* 482 U.S. at 42. See also *Charles D. Bonanno Linen Service* v. *NLRB,* 454 U.S. 404, 413 (1982); *Ford Motor Co.* v. *NLRB,* 441 U.S. 488, 495, 497 (1979); *Beth Israel Hospital* v. *NLRB,* 437 U.S. 483, 500-501 (1978).[3] The court below rejected the Board's rule, however, in

[3] Deference is owed to decisions of the Board even where the Board's position represents a change from prior policy. *NLRB* v. *Local 103, Ironworkers,* 434 U.S. 335, 351 (1978). As the Court explained in *NLRB* v. *J. Weingarten, Inc.*, 420 U.S. 251 (1975), "[t]he responsibility to adapt the Act to changing patterns of industrial life is entrusted to the Board" (*id.* at 266).

favor of the Gorman presumption.[4] The court of appeals' decision is clearly mistaken, in at least three respects.

First, the court seems to have misunderstood the way in which the no-presumption rule operates. The court surmised that the no-presumption rule "has the same effect as the presumption that striker replacements support the union in the same ratio as the employees they replace" (App., *infra,* 9a). As Judge Williams explained in dissent (*id.* at 17a), however, the two standards operate quite differently. To be sure, under the no-presumption rule the employer must still overcome the general rebuttable presumption that the union enjoys majority support. But unlike the Board's prior standard, the no-presumption rule does not require the employer to overcome the additional "presumption that the replacement workers * * * support the union" (*ibid.*). The court of appeals' failure to recognize the practical differences between the Board's present and prior standards apparently contributed to the court's unwillingness to accept the no-presumption rule in this case.

Second, the court of appeals offered no empirical support for the Gorman presumption, nor did it provide a reason for rejecting the Board's finding that the Gorman presumption is not "factually compelling" (App., *infra,* 75a). As the Board noted in its *Station KKHI* decision, a striker replacement "may be forced to work for financial reasons, or may disapprove of the strike in question but still desire union representation and would support other union initiatives" (*ibid.*). "[M]any workers might well be

[4] The term is a misleading one, since it does not appear that Professor Gorman was advocating such a presumption, only that he was reporting the Board's approach as he then understood it. See R. Gorman, *Labor Law* 112 (1976). In fact, the Board had modified that approach shortly before the publication of Gorman's text. See *Cutten Supermarket*, 220 N.L.R.B. 507 (1975).

pro-Union but might need the job or might reject the use of strikes in" a particular industry. *NLRB* v. *Windham Community Memorial Hosp.*, 577 F.2d 805, 813 (2d Cir. 1978). See also *Allied Indus. Workers Local 289* v. *NLRB*, 476 F.2d 868, 881 (D.C. Cir. 1973).

Finally, the court's decision inappropriately second-guesses the well-reasoned policy determination of "the agency charged with enforcing the National Labor Relations Act" (*Pennco, Inc.* v. *NLRB*, 459 U.S. 994, 996 (1982) (White, J., dissenting from denial of certiorari)). As the Board explained in *Station KKHI*, "adoption of [the Gorman] presumption would disrupt the balance of competing economic weapons long established in strike situations and substantially impair the employees' right to strike by adding to the risk of replacement the risk of loss of the bargaining representative as soon as replacements equal in number to the strikers are willing to cross the picket line" (App., *infra*, 75a-76a). By contrast, the Board's rule—which requires the employer to establish the preferences of the striker replacements, without the assistance of a presumption—denies the employer the power to oust an incumbent union simply by replacing a sufficient number of its members. The no-presumption rule thus furthers "[t]he overriding policy of the NLRA" of preserving " 'industrial peace' " by " 'promot[ing] stability in collective-bargaining relationships" (*Fall River Dyeing*, 482 U.S. at 38). It also protects the right to strike, a right accorded special recognition in the Act. See 29 U.S.C. 163. Even if the court below favored a different policy, it had no basis for rejecting "the balance struck by the Board" (*NLRB* v. *J. Weingarten, Inc.*, 420 U.S. 251, 267 (1975)).

2. a. The question presented in this case has divided the courts of appeals. Like the court below, the First Circuit, in *Soule Glass & Glazing Co.* v. *NLRB*, 652 F.2d 1055 (1981), approved the Gorman presumption. In *Soule*

Glass, the employer withdrew recognition from the union, contending that the number of striker replacements exceeded the number of employees who were still on strike. The court of appeals, refusing to enforce the Board's order, upheld the employer's decision. Quoting the Gorman presumption, the court explained (*id.* at 1110 (citation omitted)) that "[s]triker replacements are 'generally assumed * * * not [to] support the union and * * * ought not to be counted toward a union majority.' " The court applied the presumption and therefore treated all of the striker replacements as opponents of the union.[5]

The Eighth Circuit took a similar approach in *National Car Rental System, Inc.* v. *NLRB*, 594 F.2d 1203 (1979). In that case, the Board had ruled against the employer, applying its then-existing rule that striker replacements are presumed to support the union in the same ratio as the employees they replaced. The court of appeals denied enforcement, holding that the employer had established a sufficient basis for withdrawing recognition from the union. In doing so, the court articulated, and apparently relied upon, the Gorman presumption (*id.* at 1206).[6]

By contrast, two courts of appeals have rejected the rationale underlying the Gorman presumption. In *NLRB* v. *Windham Community Memorial Hosp.*, 577 F.2d 805 (1978), the Second Circuit held that the employer had not rebutted the presumption of continued majority status. The court assumed, without deciding, that the Board's

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[5] In addition to applying the presumption, the court stated that "the great majority of the replacements testified that they in fact wanted nothing to do with [the union] and preferred a nonunion shop" (652 F.2d at 1111).

[6] See also *Whisper Soft Mills, Inc* v. *NLRB*, 754 F.2d 1381, 1388 n.10 (9th Cir. 1984) (citing, with apparent approval, the proposition that it is "generally fair to assume that strike replacements do not support the union and should not be counted toward union majority").

then-prevailing presumption—that replacements support the union in the same ratio as the employees they have replaced—"was incorrect" (*id.* at 813). Nevertheless, the court stated, the employer's contrary presumption—"that no replacement employee supports the Union"—"is equally, if not more, assailable than the NLRB's; many workers might well be pro-Union but might need the job or might reject the use of strikes in [the particular industry]" (*ibid.*). Explaining that "presumptions do not provide [the objective] evidence" necessary to sustain an employer's burden of proof (*ibid.*), the court of appeals enforced the Board's order requiring the employer to bargain with the union.

Similarly, in *NLRB* v. *Pennco, Inc.*, 684 F.2d 340, cert. denied, 459 U.S. 994 (1982), the Sixth Circuit refused to accept either the Board's "constant ratio" presumption or the employer's suggested presumption that no replacement supports the union "when violence occurs on the picket line" (684 F.2d at 342). The court of appeals found that neither presumption was "justified under this set of stipulated facts" (*ibid.*).

b. Three Members of this Court, dissenting from the denial of certiorari in the *Pennco* case, expressly noted the conflict among the circuits concerning the use of presumptions in this context. After reviewing the court of appeals' decisions, Justice White, joined by Justices Rehnquist and Blackmun, concluded that "[t]he questions of whether presumptions can properly be used to determine whether a union has the support of striker replacements, and whether replacements should be presumed to oppose the certified union or favor the certified union, have produced conflict among the Courts of Appeals and between the Courts of Appeals and the agency charged with enforcing the National Labor Relations Act" (459 U.S. at 996). Because "[t]he questions are of obvious importance" and because of "[t]he need for a uniform approach to these

questions" (*ibid.*), these Justices would have granted the petition in the *Pennco* case.[7]

c. The decision below sharpens the conflict among the circuits still further. Rejecting the well-reasoned rule adopted by the Board, the court of appeals endorsed a presumption that lacks a solid empirical foundation and is significantly at odds with the purposes and policies of the NLRA. The decision below is also an appropriate vehicle for resolving the circuit conflict, since, as Judge Williams observed in dissent (Pet. App. 12a), "[t]he outcome of this case turns on the significance attached to the hiring of permanent replacement workers during an economic strike." Further review by this Court is therefore warranted.

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[7] The Board filed a brief in opposition in *Pennco*, a copy of which has been furnished to respondent. Without disputing the conflict among the circuits, the Board simply distinguished the cases that had relied on the Gorman presumption. In particular, the Board noted (Br. in Opp. 6-7) that unlike in *National Car Rental System, supra,* and *Soule Glass, supra,* the striker replacements in the *Pennco* case did not constitute a majority of the bargaining unit. Thus, the Board noted, "[e]ven if the presumption of majority status is rebutted where striker replacements constitute a majority of the bargaining unit, it does not follow that the same conclusion is warranted where, as here, the replacements constituted only a minority of the unit employees" (Br. in Opp. 6-7). In the present case, by contrast, the replacements constituted a majority of the bargaining unit on the date that respondent withdrew recognition from the union. The application of the Gorman presumption was thus crucial to the result reached by the court of appeals.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 1989

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 88-4012

CURTIN MATHESON SCIENTIFIC, INC.,
PETITIONER CROSS-RESPONDENT

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT CROSS-PETITIONER

Nov. 4, 1988

Before WILLIAMS and GARWOOD, Circuit Judges, and NOWLIN,* District Judge.

NOWLIN, District Judge:

This case is before the Court on the petition of Curtin Matheson Scientific, Inc., for review of the unfavorable decision of the National Labor Relations Board (the Board), and the Board's cross-application for enforcement. The Board found that Curtin Matheson Scientific, Inc. (the Company) violated sections 8(a)(1) and (5) of the National Labor Relations Act, 29 U.S.C. §§ 158(a)(1) and (5), by withdrawing recognition of Local 968, General Drivers, Warehousemen and Helpers (the Union) as the representative of the Company's employees, by failing and

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* District Judge of the Western District of Texas, sitting by designation.

refusing to furnish the Union with certain information requested, and by failing and refusing to execute a written contract embodying a collective-bargaining agreement found to have been reached on July 16, 1979.

The Board ordered the Company to desist from these unfair labor practices. As affirmative relief, the Board ordered the Company to recognize and, on request, to bargain with the Union concerning the terms and conditions of the employment of the bargaining unit employees, and to provide the information requested. The Board further ordered the Company to execute the collective-bargaining agreement if the Union so requested, and to give retroactive effect to the agreement's terms and conditions and make the bargaining unit employees whole for any losses they suffered as a result of the Company's refusal to sign the agreement. If the Union elected not to request execution of the agreement, then the Board ordered the Company to bargain in good faith with the Union concerning the terms and conditions of a new agreement, and to sign a contract embodying any agreement reached. Finally, the Company was required to post copies of a remedial notice to employees. We reverse.

I.

The Company trades in laboratory instruments and supplies, and maintains a warehouse in Houston, Texas, where the acts which are the basis of this case occurred. On April 15, 1970, the Board certified Local 968, General Drivers, Warehousemen and Helpers, which was affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO (the Union), as the collective-bargaining agent for the company's production and maintenance employees. On May 21, 1979, the latest collective-bargaining agreement

between the parties expired. The Company and the Union had not reached contract agreement when, on May 25, 1979, the Company made a final offer. The Union rejected this offer on May 29, 1979. A lockout of all twenty-seven bargaining unit employees lasted from June 4 to June 12, 1979. On June 12, 1979, the Company's offer was renewed and again rejected.

On June 13, 1979, the Union began an economic strike which lasted until July 16, 1979. Five of the twenty-seven bargaining unit employees immediately crossed the picket line and returned to work. The record contains no evidence of picket line or other strike-related violence or threats during the course of the strike. On June 17, 1979, the Company put into effect the wage schedule proposed in its May 25, 1979 offer. On June 25, 1979, with the strike still in progress, the Company hired twenty-nine new employees to replace the twenty-two strikers; the additional seven employees were hired to compensate for the new workers' inexperience and to allow for attrition.

On July 16, 1979, the Union ended its strike, offered unconditionally to have the striking employees return to work, and informed the Company that it was accepting the May 25, 1979 offer. The Union asked the Company to execute the contract on July 19, 1979. Then, on July 20, 1979, the Company notified the Union that the May 25, 1979 offer was not available, and because it had doubts as to the Union's majority status, that the Company was withdrawing recognition and refusing to bargain further. On July 20, 1979, there were nineteen employees still on strike, and twenty-five striker replacements and the five cross-over employees working for the Company in bargaining unit positions.

On July 20, 1979, the Union also requested that the Company furnish information regarding the total number of bargaining unit employees on the payroll, and the job

classification and seniority of each of these employees. The Company did not furnish this information.

The Union filed an unfair labor practices charge with the Board on July 30, 1979, alleging violations of sections 8(a)(1) and (5) of the National Labor Relations Act, 29 U.S.C. §§ 158(a)(1) and (5). The Board issued a complaint against the Company on September 7, 1979. Administrative Law Judge Martin S. Bennett (the ALJ) heard the matter on June 10, 1980. In his November 20, 1980 decision, the ALJ held that the Company had a reasonably based good-faith doubt as to the Union's majority status, and dismissed the entire complaint on that ground.

The Board reviewed the ALJ's decision, and on December 16, 1987, held that the Company had not made an adequate showing of good faith doubt. *See Curtin Matheson Scientific, Inc.*, 287 NLRB No. 35 (1987). The Board concluded that the Company had violated sections 158(a)(1) and (5) of the Act by withdrawing Union recognition, by failing and refusing to furnish requested information, and by failing and refusing to execute the May 25, 1979 contract offer accepted by the Union on July 16, 1979. The Company timely appealed, invoking this Court's appellate jurisdiction under 29 U.S.C. §§ 160(e) and (f).

II.

We have previously established a framework for evaluating a company's withdrawal of recognition of a union. In *NLRB v. Randle-Eastern Ambulance Service, Inc.*, 584 F.2d 720, 727-28 (5th Cir.1978), we provided:

> In the absence of special circumstances, a Union's majority status is irrebuttably presumed for a period of one year following certification or voluntary recognition. *See Brooks v. NLRB,* 1954, 348 U.S. 96,

103-04, 75 S.Ct. 176 [181-82], 99 L.Ed. 125 (certification); *NLRB v. Physicians & Surgeons Community Hospital,* 5 Cir., 1978, 577 F.2d 305, 307 (voluntary recognition). After the expiration of the certification year, the presumption of the Union's continuing majority support continues but becomes rebuttable. *J. Ray McDermott & Co. v. NLRB,* 5 Cir., 1978, 571 F.2d 850, 858; *NLRB v. Gulfmont Hotel,* 5 Cir.1966, 362 F.2d 588. A good faith doubt of the union's majority status is a defense to a refusal to bargain charge based on the withdrawal of recognition. That doubt must rest on 'objective evidence.' *J. Ray McDermott, supra,* and 'may not depend solely upon unfounded speculation or a subjective state of mind.' *Gulfmont Hotel, supra,* at 589. But the employer need not conclusively demonstrate that a majority of his employees no longer desire to be represented by the Union.

Accordingly, after the expiration of the collective-bargaining agreement on May 21, 1979, the Union enjoyed a rebuttable presumption that its majority status was continuing. The Company was justified in withdrawing recognition from the Union if it overcame the presumption of majority support by affirmatively establishing either: (1) at the time of withdrawal of recognition, the Union in fact no longer enjoyed majority status; or (2) the Company's refusal to bargain was predicated upon a reasonably grounded doubt as to the Union's continued majority status asserted in good faith, based upon objective considerations, and raised in a context free of employer unfair labor practices. It is the second ground upon which the Company relied in withdrawing recognition of the Union.

In reviewing the Board's findings and conclusions, we are limited by the substantial evidence rule, and should not review the charge *de novo. Universal Camera Corp. v.*

NLRB, 340 U.S. 474, 487-88, 71 S.Ct. 456, 464-65, 95 L.Ed. 456 (1951); *Randle-Eastern,* 584 F.2d at 725; 29 U.S.C. § 160(e). The Company asserts that its doubt was arrived at in good faith, based on the following factors: (1) the hiring of permanent replacements for all of the strikers and anti-union statements made by permanent replacements; (2) employees crossing the picket line; (3) strong anti-union statements and statements of non-support by cross-over employees and by striking employees; (4) expressions of Union officials concerning the weakness of the Union and lack of employee support, *e.g.,* "the employees didn't want anything to do with the Union;" and (5) Union inactivity and lack of communication with the Company. The ALJ's findings of fact were not overruled by the Board, and the facts as stated by the Board are uncontested by the parties.

On July 20, 1979, nineteen of the original twenty-two striking workers were still on strike, and twenty-five of the original twenty-nine striker replacements and the five cross-over employees were still working, for a total of forty-nine employees in the bargaining unit. *See C.H. Guenther & Son, Inc. v. NLRB,* 427 F.2d 983, 986-87 (5th Cir.), *cert. denied,* 400 U.S. 942, 91 S.Ct. 240, 27 L.Ed. 246 (1970); 29 U.S.C. § 152(3). Accordingly, before withdrawing recognition, the Company was required to have good faith doubt as to Union support by twenty-five of the employees. The Company's source of information regarding Union support was Elizabeth Price, the director of employee relations. In the two months prior to July 20, 1979, she had conversations with two of the cross-over employees, four of the strikers, and one striker replacement.

Ms. Price spoke with Tony Lopez and Bill Lee, two of the five cross-over employees. Both men were not Union members. Mr. Lopez talked twice with Price, indicating

that the Union had done nothing for the employees and that the Union's business representative was not doing his job. Mr. Lopez also stated that he had not and would not pay Union dues because he would not support the Union in any way. Mr. Lee stated that he did not pay Union dues because he did not support the Union and believed that the Union had not done anything for the employees.

The four strikers who crossed the picket line to speak with Ms. Price were Shady Goodson, J.R. Blackshire, Raymond Brunner, and Clint Waller. Chief Shop Steward Goodson, who was a member of the Union's negotiating committee, told Ms. Price that he was speaking on his own behalf; and although other striking employees shared his sentiments, he said he was not speaking as a representative of the Union employees or the Union. He felt that only the Union wanted the strike, not the employees. He was having difficulties manning the picket line. At a later time, Mr. Goodson requested reinstatement; and on July 19, 1979, he resigned. The Company would have been justified in giving significant weight to Mr. Goodson's comments, even though he was not speaking in his official capacity. *See Randle-Eastern,* 584 F.2d at 729; *Star Manufacturing Co. v. NLRB,* 536 F.2d 1192, 1196 (7th Cir. 1976); *Lodges 1746 and 743, International Association of Machinists v. NLRB,* 135 U.S.App.D.C. 53, 57-58, 416 F.2d 809, 812-13 (1969), *cert. denied,* 396 U.S. 1058, 90 S.Ct. 751, 24 L.Ed. 752 (1970).

Mr. Blackshire, a former shop steward, crossed the picket line to request reinstatement. He was angered by the Union first failing to pay him for walking the picket line, and then deducting Union dues from his payments. After requesting reinstatement, Mr. Blackshire spoke with friends working in the Company's warehouse. After a few minutes, he called Ms. Price over, and told her there was no Union anymore, that the people were not supporting it.

Mr. Blackshire also stated that there were other striking employees who wanted to return to work.

Mr. Brunner crossed the picket line to express his intention of retiring early because he did not want to work with the Union again. Finally, Mr. Waller indicated that he was not manning the picket line and would continue not to do so. He felt the Union was not representing the employees, and wanted "this thing," apparently the strike, to be over. He indicated a desire to withdraw from the Union.

Twenty-nine striker replacements were hired on June 25, 1979. There is no evidence of the Union attempting to contact any of the striker replacements during the strike. On July 19, 1979, Ms. Price spoke with one of the replacements, David Schneider. Mr. Schneider stated that he had experiences as a union and non-union worker. His assessment was that the Union did not represent the Company, and that the Union was not needed.

The Board relied on the standard set forth in *Buckley Broadcasting Corp. (Station KKHI),* 284 N.L.R.B. No. 113 (1987), in ruling that the Company did not have reasonably grounded good-faith doubt as to the Union's majority status. In *Station KKHI,* the Board rejected the presumption that striker replacements favor the union, and rejected the contrary assumption that strike replacements repudiate the union as their collective-bargaining representative. The Board concluded by declining to maintain or create any presumption regarding striker replacements' union sentiments. The Board contends that *Station KKHI* represents a comprehensive reconsideration of the Board's approach to the characterization of striker replacements in withdrawal of recognition cases. Prior to *Station KKHI,* the Board states that it presumed striker replacements desired to be represented by the incumbent union in the same ratio as the employees they replaced, a presumption that we discredited ten years ago in *Randle-Eastern.*

We do not agree that *Station KKHI* establishes a new standard because operationally the *Station KKHI* standard has the same effect as the presumption that striker replacements support the union in the same ratio as the employees they replace. Under the *Station KKHI* holding that no presumption will be made about striker replacements' support or nonsupport of the union, the general presumption of continuing union majority still applies. Under either standard, the Company is required to have objective evidence regarding the striker replacements' nonsupport in order to count them as employees whom the Company doubts support the Union.

In *Randle-Eastern,* we considered the presumption that new employees support the union in the same ratio as those they have replaced, and rejected its application where employee turnover results from the replacement of strikers. *Randle-Eastern,* 584 F.2d at 728. We also adopted the Gorman presumption,[1] stating that it was "especially true," where the striker replacements were the victims of picket line violence, and the Union was bargaining for the discharge of the striker replacements to make room for returning strikers. *Id.*

The Company contends that that the Gorman principle applies even in the absence of special circumstances such as those present in *Randle-Eastern.* Therefore, even though there was no picket line violence or negotiating to discharge the striker replacements, the Company argues that it was justified in counting the twenty-two striker replacements as not supporting the Union on July 20, 1979.

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[1] R. Gorman, Labor Law 112 (1976): "[I]f a new hire agrees to serve as a replacement for a striker (in union parlance, a strike breaker, or worse), it is generally assumed that he does not support the Union and that he ought not to be counted toward a Union majority."

We hold that the Company was justified in doubting that the striker replacements supported the Union in this context. Over eighty percent of the bargaining unit work force (twenty-two of twenty-seven employees) was replaced on June 25, 1979. Where such a substantial percentage of the bargaining unit employees is replaced on the same day, and the striker replacements cross a picket line, violent or not, to report to work each day, the Company is justified in counting the striker replacements as employees whom they doubt support the Union. This holding is in accord with the Eighth Circuit's opinion in *National Car Rental System, Inc. v. NLRB,* 594 F.2d 1203 (8th Cir.1979). The Eighth Circuit adopted the Gorman presumption where all ten of the original bargaining unit employees commenced a strike and were subsequently replaced by permanent employees who all began work within a one-week period and crossed picket lines to apply for and report to work. *See also Soule Glass & Glazing Co. v. NLRB,* 652 F.2d 1055, 1109-10 (1st Cir.1981).

We therefore reverse the Board's finding that the Company violated sections 8(a)(1) and (5) by withdrawing recognition of the Union. The Court also reverses the Board's findings that the Company violated these sections by refusing and failing to furnish the Union with certain information requested, and by failing and refusing to execute a written contract embodying a collective-bargaining agreement the Board found was reached on July 16, 1979. The information at issue was requested on July 20, 1979, the same day that the Company justifiedly withdrew recognition of the Union as the employees' collective-bargaining representative. Since an employer is only obligated to provide its employees' bargaining representative with information necessary and relevant to fulfill its statutory collective-bargaining function, the Company did not commit an unfair labor practice by refusing to provide the

information requested. By the same logic, no violation of sections 8(a)(1) and (5) occurred when the Company refused to execute a contract when the Union attempted to accept the Company's May 25, 1979 offer.

Enforcement denied.

JERRE S. WILLIAMS, Circuit Judge, dissenting:

I would enforce the Board's order requiring Curtin Matheson Scientific to recognize and, on request, bargain with the Union. I conclude that the Board's refusal to attach presumptive significance to the hiring of replacement workers is a reasonable policy choice which is not inconsistent with our prior decisions. Moreover, there is sufficient evidence to support the Board's determination that the Company's withdrawal of recognition in this case was not justified. Accordingly, I must respectfully dissent.

I. *Standard of Review*

As the majority correctly notes, but as I wish to emphasize, this Court does not review the Board's decision *de novo.* We do not reach our decision on the facts before us. Instead, we are limited by the substantial evidence rule, an inquiry as to whether the Board's decision is supported by "substantial evidence on the record considered as a whole." 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 487-88, 71 S.Ct. 456, 464-65, 95 L.Ed. 456 (1951). The simple phrase "substantial evidence", however, does not completely describe the standard of review in this particular case where we consider not only the Board's factual conclusions but also its evolving policy regarding the significance attached to the hiring of replacement workers.

A great degree of deference is owed to the Board's policy choices, even when "the Board might have struck a

different balance from the one it has, and it may be that some or all of us would prefer that it had done so." *Charles D. Bonanno Linen Service v. NLRB,* 454 U.S. 404, 413, 102 S.Ct. 720, 725, 70 L.Ed.2d 656 (1982). Indeed, when the Board's policy decision "is not an unreasonable or unprincipled construction of the statute [it] should be accepted and enforced." *Ford Motor Co. v. NLRB,* 441 U.S. 488, 497, 99 S.Ct. 1842, 1849, 60 L.Ed.2d 420 (1979). Moreover, we must remember that the Board is entitled to change its views, and the same deference must be shown to any new policy. *NLRB v. Local 103, Ironworkers,* 434 U.S. 335, 351, 98 S.Ct. 651, 660-61, 54 L.Ed.2d 586 (1978). In short, "the Board may alter its standards provided the new standards are rational and consistent with the Act." *Hotel Employees and Restaurant Employees Union, Local 11 v. NLRB,* 760 F.2d 1006, 1008 (9th Cir.1985).

II. *The Impact of Hiring Replacement Workers*

The outcome of this case turns on the significance attached to the hiring of permanent replacement workers during an economic strike.[1] We start with the statutory definition of employee which includes "any individual whose work has ceased as a consequence of or in connection with, any current labor dispute . . ." 29 U.S.C. § 152(3). Then the statute itself makes clear that employees who have been "replaced" are nevertheless still eligible

[1] As pointed out in later discussion, the other factors cited by the Company would not, by themselves, justify the withdrawal of union recognition. In particular, the refusal of five workers to join the strike and the statements of discontent by seven employees are not sufficient evidence to support a good faith doubt as to the Union's continued majority status, even where the workers purport to speak for other employees.

to vote in the bargaining unit. 29 U.S.C. § 159(c)(3) provides: "Employees engaged in an economic strike who are not entitled to reinstatement (because they have been replaced etc.) shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this subchapter in any election conducted within twelve months after the commencement of the strike." (parenthetical statement added). *See C.H. Guenther & Son, Inc. v. NLRB,* 427 F.2d 983 (5th Cir.), *cert. denied,* 400 U.S. 942, 91 S.Ct. 240, 27 L.Ed.2d 246 (1970) (enforcing a Board order based upon § 159(c)(3) as quoted above.)

These statutory provisions make effective the right to strike as a core principle in a free economic society. The guarantee is contained in 29 U.S.C. § 163. Then the statutory provisions go on to recognize the usual pragmatic resolution of an economic strike where replacements have been hired. The settlement of an active economic strike almost always requires reinstatement of the strikers with full seniority rights. The replacements often are retained also but at junior seniority. Attrition is counted upon gradually to reduce the work force to a realistic complement. Note that the statute sets twelve months as the realistic time of the outside limit upon whether a strike is active. In the case before us a mere month was the strike duration.

These facts and the statutory provisions lay the foundation for the consideration of the legal issue of importance in this case: Does the company have the right, under the law, to assume that the strike replacements are anti-union? The Board refuses to presume that the replacement workers are for or against the union, following its new policy set out in *Station KKHI (Buckley Broadcasting of California Corp., Inc.),* 284 N.L.R.B. No. 113, 125 L.R.R.M. (BNA) 1281 (1987), application for enforce-

ment pending, 9th Cir. No. 88-7106. Under this approach, a company which wishes to withdraw union recognition has the burden of providing objective evidence of a lack of union support, without the aid or detriment of any presumptions regarding replacement workers.

In *Station KKHI,* the Board reconsidered and rejected its prior position that replacement workers supported the incumbent union in the same ratio as the employees they replaced. Responding to criticism by the Courts of Appeals that this presumption was counterintuitive and created an unrealistic hurdle for employers to overcome, the Board concluded that "[a]s a matter of policy, there is no warrant for a presumption of strike replacement support for an incumbent union." 125 L.R.R.M. at 1283.

The Board in *Station KKHI,* however, also declined to adopt the opposite, negative presumption that replacement workers *do not* support the union. The Board recognized that the failure of replacement workers to withhold working as a means of supporting an economic strike is not necessarily an indication of dissatisfaction with the union. In particular, "an employee may be forced to work for financial reasons, or may disapprove of the strike in question but still desire union representation and would support other union initiatives." 125 L.R.R.M. at 1286. *See also NLRB v. Pennco, Inc.,* 684 F.2d 340, 342 (6th Cir.), *cert. denied,* 459 U.S. 994, 103 S.Ct. 355, 74 L.Ed.2d 392 (1982); *NLRB v. Windham Community Memorial Hospital,* 577 F.2d 805, 813 (2d Cir.1978).

The Board also identified significant policy concerns which led it to reject the negative presumption that replacement workers do not support the union. The ultimate impact of the negative presumption, and the unfortunate result of the majority opinion, is to allow an employer to withdraw union recognition in the economic strike context whenever he hires more replacement workers than the

number of employees on strike. The Board determined that this policy "would disrupt the balance of competing economic weapons long established in strike situations and substantially impair the employees' right to strike by adding to the risk of replacement the risk of loss of the bargaining representative." 125 L.R.R.M. at 1286.

Thus, in *Station KKHI* the Board decided to reject both the positive and negative presumptions regarding union support among replacement workers. The Board concluded that

> we can discern no overriding generalization about the views held by strike replacements and therefore we decline to maintain or create any presumptions regarding their union sentiments. Rather, we will review the facts of each case, but will require 'some further evidence of union non-support' before concluding that an employer's claim of good-faith doubt of the union's majority is sufficient to rebut the overall presumption of continuing majority status.

Id., citing *NLRB v. Pennco,* 684 F.2d at 343.

The Board's analysis in *Station KKHI* is compelling under the provisions of the basic statute. Some courts agree with the Board's position and have refused to attach presumptive significance to the hiring of replacement workers. *NLRB v. Windham Hospital,* 577 F.2d at 813-13. *NLRB v. Pennco,* 684 F.2d at 342. This *ad hoc* approach allows the Board to take into account the particular circumstances surrounding each strike and the hiring of replacements, while retaining the long-standing requirement that the employer must come forth with some objective evidence to substantiate his doubt of continuing majority status. *See NLRB v. Gulfmont Hotel Co.,* 362 F.2d 588, 592 (5th Cir.1966); *J. Ray McDermott & Co., Inc. v. NLRB,* 571 F.2d 850, 858-59 (5th Cir.), *cert. denied,* 439

U.S. 893, 99 S.Ct. 250, 58 L.Ed.2d 238 (1978). Moreover, the refusal to apply presumptions of union support or non-support to replacement workers is consistent with the Board's position regarding workers employed when a strike begins who also cross the picket line.[2]

The question before us, however, is not the subjective question the majority implicitly asks, whether the Board's policy is "correct." The refusal to attach any presumptive weight to the hiring of replacement workers is, at the very least, a reasonable policy choice which is not inconsistent with the National Labor Relations Act. As such, even if this Court prefers a different approach the only proper course is to enforce the Board's view because of the deference we are required to afford the Board's policy decisions.

The majority has nonetheless determined that we should reject the Board's policy as set out in *Station KKHI*. First, they contend that the Board did not really adopt a new standard in *Station KKHI,* but instead returned to the presumption that permanent replacements support the union in the same ratio as the workers they replaced, a position this Court rejected in *NLRB v. Randle-Eastern Ambulance Service, Inc.*, 584 F.2d 720 (5th Cir.1978). They conclude that "operationally the *Station KKHI* standard has

[2] The Board does not presume that the failure of original employees to join a strike indicates their lack of support for the union. *Windham Community Memorial Hospital,* 230 N.L.R.B. 1070 (1977), *enforced* 577 F.2d 805, 813-14 (2nd Cir.1978); *Skydyne Division of Brooks & Perkins, Inc.*, 282 N.L.R.B. No. 143, 124 L.R.R.M. (BNA) 1358 (1987); *Ashe Brick Co.*, 280 N.L.R.B. No. 162, 123 L.R.R.M. (BNA) 1023 (1986). It seems incongruous that the majority apparently accepts this proposition, which was applied by the Board in the present case, and at the same time concludes that when it is *replacement workers* who cross the picket line it should be presumed that they do not support the union.

the same effect as the presumption that striker replacements support the union . . . [because] the general presumption of continuing union majority still applies."

It is true, as the majority notes, that under both the Board's prior presumption of union support among replacement workers and its current neutral position announced in *Station KKHI,* an employer must come forward with some objective evidence regarding the replacement workers' failure to support the union. This does not mean, however, that the two standards are the same. What is different is the nature and amount of evidence required. The *Station KKHI* standard follows the general requirement that an employer must provide evidence of the lack of union support to substantiate his doubt of the union's majority status, and simply applies this long-standing rule in the context of an economic strike situation where replacements have been hired. In contrast, the Board's prior rule required more—in the face of a presumption that the replacement workers *did* support the union, the employer had to submit evidence of sufficient quantity and quality to prove that such support did not in fact exist. Stated more pragmatically, the new Board policy gives more flexibility to consider each situation on its own facts.

The majority also suggests that the Board's refusal to attach any presumptive significance to the hiring of replacement workers conflicts with the holding of this Court in *NLRB v. Randle-Eastern, supra.* In *Randle-Eastern,* we rejected the Board's positive presumption that replacement workers support the union in the same ratio as the employees they have replaced. The majority contends that we also held that the opposite, negative presumption that replacement workers do not support the union must apply.

While several courts did reject the Board's prior position that replacement workers do support the union in the same proportion of the employees, there is a conflict among the

circuits regarding the appropriate substitute for that policy.[3] Some courts approve the *Station KKHI* approach and permit the Board to refuse to presume that replacement workers are for or against the union. *NLRB v. Windham Hospital,* 577 F.2d at 813-14; *NLRB v. Pennco,* 684 F.2d at 342. Other circuits have specifically adopted the requirement of a negative presumption, also known as the Gorman presumption,[4] that replacement workers do

[3] *See Pennco, Inc. v. NLRB,* 459 U.S. 994, 103 S.Ct. 355, 74 L.Ed.2d 392 (1982) (denial of writ of certiorari to petitioner Pennco in *NLRB v. Pennco,* 684 F.2d 340 (6th Cir.1982), a case upholding a no presumption rule.) Justice White, joined by Justices Blackmun and Rehnquist, dissented from the denial of certiorari, noting that "[t]he questions of whether presumptions can properly be used to determine whether a union has the support of striker replacements, and whether replacements should be presumed to oppose the certified union or favor the certified union, have produced conflict among the courts of appeals and between the courts of appeals and the agency charged with enforcing the National Labor Relations Act." 459 U.S. at 996, 103 S.Ct. at 356.

[4] R. Gorman, Labor Law 112 (1976): "If a new hire agrees to serve as a replacement for a striker (in union parlance, a strike breaker, or worse), it is generally assumed that he does not support the union and that it ought not to be counted toward a union majority."

The Justices dissenting from the denial of certiorari in the *Pennco* case recognized that those circuits which "appear to presume that striker replacements do not support the certified union . . . seem to rely heavily on the statement made by one commentator, R. Gorman." The Justices then noted that Professor Gorman's original statement was supported only by a single citation to *Titan Metal Manufacturing Co.,* 135 NLRB 196 (1962), "a case that has neither been cited by the NLRB for the proposition Gorman states nor been expressly overruled." 459 U.S. at 995, 103 S.Ct. at 355.

As an astute labor law scholar, I expect that Professor Gorman would be among the first to disavow that policy under the National Labor Relations Act is to be made by a single-author textbook or even by the courts rather than by the NLRB itself. Further, as a generalization, the Gorman statement does not take into account the fact that

not support the union. *Soule Glass & Glazing Co. v. NLRB,* 652 F.2d 1055, 1109-10 (1st Cir.1981); *National Car Rental System, Inc. v. NLRB,* 594 F.2d 1203 (8th Cir. 1979).

Our opinion in *Randle-Eastern* does not place this Circuit within that latter category. The holding of *Randle-Eastern* is that the presumption that new workers support the union in the same ratio as the employees they have replaced "does not apply where the 'turnover' results from the replacement of strikers." 584 F.2d at 728. The rejection of this positive presumption, however, does not constitute the creation of the opposite, negative presumption that these workers do not support the union. *See Pennco,* 684 F.2d at 342; *Windham Hospital,* 577 F.2d at 813-14. While the *Randle-Eastern* decision did cite to Professor Gorman's treatise, the Gorman presumption was not made part of the court's holding.[5]

Even more significant and fully persuasive is the circumstance that *Randle-Eastern* is factually distinguishable from the present case. The *Randle-Eastern* court emphasized that the picket line violence and the union's insistence that the replacement workers would have to be discharged were factors which gave credence to the employer's belief that the replacement workers did not support the union.

some strike replacements sorely need the wages regardless of union sympathy (they are not drawing strike benefits as striking employees may be). Still others may approve of the union because of its important grievance procedures for example, even though they feel the particular strike is ill-advised.

[5] The *Randle-Eastern* court simply made reference to Professor Gorman's statement, but did not incorporate Gorman's position into the court's own pronouncement. 584 F.2d at 728. At its strongest, the court's reference to the Gorman presumption is equivocal. In the face of this ambiguity, *Randle-Eastern* is not properly construed as precluding the Board's *Station KKHI* policy.

584 F.2d at 723. It is highly unlikely that a replacement worker supports the Union if it is demanding that he be discharged and also is acting toward him with violence. These circumstances are totally absent in the case now before us. They militate against reading *Randle-Eastern* as establishing a general rule applicable in every strike situation where replacement workers are hired.[6]

Thus, *Randle-Eastern* is read much too broadly by the majority of the panel. Moreover, the Board's *Station KKHI* policy is not, as the majority contends, a mere restatement of the approach rejected in *Randle-Eastern*. Accordingly, I conclude we are bound to accept the Board's *Station KKHI* approach as a reasonable implementation of the policy of the law.

III. *The Board's Decision*

The preceding conclusion on the legal issue leads to the remaining issue of whether the NLRB's factual conclusions are supported by substantial evidence on the record considered as a whole. The Board concluded that the evidence of a lack of Union support offered by the Company was insufficient to rebut the well-established and unchallenged presumption of continuing majority status, and thus the Company's withdrawal of recognition violated § 8(a)(1) and 8(a)(5) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1) and (5). In addition to the hiring of

[6] The *Randle-Eastern* decision is analogous to *Whisper Soft Mills, Inc. v. NLRB*, 754 F.2d 1381 (9th Cir.1984). While the Company would have us believe that the Ninth Circuit unambiguously adopted the Gorman presumption in *Whisper Soft Mills*, a reading of the case shows that this is not so. Instead, the court concluded that the Administrative Law Judge was correct in determining that the replacement workers did not support the union under the "unique circumstances" of the case: the union was demanding discharge of a majority of the replacement workers. 754 F.2d at 1388.

replacement workers, which the Board has determined is not a basis for presuming anti-union sentiment, the Company primarily relied on statements of dissatisfaction with the Union made by seven employees, one of whom was a replacement employee. The Company also argues that the fact that five employees failed to join the strike and the Union's inactivity indicated that the Union had lost its majority status. But consideration of the entire record shows that there is more than sufficient evidence to support the Board's determination that the Company did not meet its burden of establishing a reasonably grounded good faith doubt of the Union's continued majority status. This Court should act in accordance with our assigned role, therefore, by enforcing the Board's decision.

First, as the Board has long held, the fact that five out of twenty-seven original employees failed to join the strike is not persuasive evidence that these employees do not support the Union. *See supra* note 2. Moreover, the Board correctly refused to attach any significance to the fact that the Union was not in contact with the Company for a little more than a month after the strike began.[7] While it is true that an employer may be justified in withdrawing union recognition after a sustained period of union inactivity, it is well within the course of bargaining for a union to fail to put forth a new or compromise proposal for several months. The Union's decision not to contact the Company for approximately five weeks in no way provides evidence of a lack of majority support for the Union. *Windham*

[7] The Company argues that the Union's "inactivity" also serves as evidence of its good faith doubt of the union's majority status. This assertion is unrealistic in the real world of lawful strike activity. The Union was conducting a strike during nearly all of the period in question. The Company is referring to the fact that the Union did not immediately respond to every Company offer, and failed to contact the Company from June 12 to July 16, 1979.

Hospital, 577 F.2d at 814 ("the failure of the union to communicate with the [employer] during most of the summer months also does not provide grounds for doubt" of the union's majority status.)

It is clear that, absent any negative presumptions regarding replacement workers, the Company must rely on expressions of dissatisfaction with the Union made by seven employees to establish its good faith doubt of the Union's majority status. There is nothing in the record which should lead this Court to disturb the Board's conclusion that these statements are not sufficient evidence of a lack of majority support to justify a withdrawal of union recognition.

The Company makes much of the fact that a few employees who voiced complaints purported to speak for others, and asserted that other workers were dissatisfied with the Union. The Board has properly determined, however, that as a general rule such imputed representations of the opinions of others do not carry great weight. Otherwise, "a few anti-union employees could provide the basis for a withdrawal of recognition when in fact there is actually an insufficient basis for doubting the union's continued majority." *Golden State Habilitation Convalescent Center,* 224 N.L.R.B. 1618, 1619-20, enforcement denied on other grounds *sub nom. Dalewood Rehabilitation Hospital, Inc. v. NLRB,* 566 F.2d 77 (9th Cir.1977). There is no reason to disturb the Board's conclusion as to this contention.

The majority argues that the Company was justified in attaching "significant weight" to the comments of Chief Shop Steward Shady Goodson, who stated that he was having difficulty manning the strike and that only the Union, and not the employees, wanted the strike. Mr. Goodson expressly stated, however, that he was not speaking as a representative of the employees or the Union. The

Board was entitled to accept his disclaimer and give weight to his comments accordingly. It is for the Board to weigh evidence and pass on credibility, not for us. Moreover, Mr. Goodson's comments simply do not rise to the level of official union acknowledgement of a lack of union support which was exhibited in those opinions upon which the majority relies. *See e.g., Lodges 1746 and 743, Int'l Association of Machinists v. NLRB,* 135 U.S.App.D.C. 53, 57-58, 416 F.2d 809, 812-13 (1969), *cert. denied,* 396 U.S. 1058, 90 S.Ct. 751, 24 L.Ed.2d 752 (1970) (written memorandum by union's attorney flatly stating that the union did not enjoy a majority support); *Randle-Eastern,* 584 F.2d at 728 (company had been informed by a union representative that "50 to 25 or 20%" of the strikers would not be returning to work).

Finally, I note some parts of the record which the majority of the panel overlooks but which further support the Board's decision. First, several of the statements which the Company relies upon, including the statements of Mr. Goodson and the complaints regarding strike pay made by Mr. Blackshire, can legitimately be construed as objections to the strike itself or the way it is being conducted. Such statements do not necessarily constitute a rejection of the Union as a bargaining representative. *Windham Hospital,* 577 F.2d at 814. Moreover, while the Company and the majority both note that one replacement worker, Mr. Schneider, volunteered the opinion that the Union did not represent the employees and was not needed, they fail to point out that fourteen other replacement employees were interviewed in the same manner as Mr. Schneider, and none of them volunteered any animus toward or opposition to the Union.[8] The majority of the panel clearly

[8] Ms. Price, the director of employee relations who provided the Company with its information regarding Union support, conducted

intruded into the role of the Board when it gave substantial weight to the anti-union statements of this one replacement worker while ignoring the fact that fourteen other replacement workers were given exactly the same opportunity to speak and did not feel any stimulus to offer any thoughts pro or con as to the Union.

The bottom line is that the seven employees who voiced complaints about the Union were members of a bargaining unit of fifty. The Board could reasonably conclude that their dissatisfaction was not sufficient evidence to justify a conclusion that the Union has lost *majority* support. The majority of the panel does not afford the statutorily mandated power to the Board to decide this case as an adjudication based upon all the evidence. I cannot agree to usurping the Board's proper role in this manner. The majority makes of itself a super labor board rather than a reviewing court of appeals. I would therefore enforce the Board's order that the Company must recognize and bargain with the Union. I dissent.

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interviews of fifteen of the replacement workers on July 18-19, 1979 to see how they were coming along with their new jobs. She did not solicit comments regarding the Union.

Of the fifteen workers interviewed, only two mentioned the Union. One stated that "the Union thing did not enter his mind." The other, Mr. Schneider, voiced his assessment that the Union was not needed "as long as the Company treats him good." The failure of most replacement employees to state an opinion either way lends credence to the Board's position that these workers should not be presumed to be for or against the Union.

APPENDIX B

UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 23–CA–7620

CURTIN MATHESON SCIENTIFIC, INC.

AND

GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL 968, AFFILIATED WITH INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO[1]

DECISION AND ORDER

On 20 November 1980 Administrative Law Judge Martin S. Bennett issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed a brief opposing the General Counsel's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions[2] and briefs and has decided to

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[1] On 1 November 1987 the Teamsters International Union was readmitted to the AFL-CIO. Accordingly, the caption has been amended to reflect that change.

[2] The General Counsel excepted to the judge's denial of a motion to amend the complaint filed by the General Counsel after the hearing in this matter. We affirm the judge's disposition of the motion for the reasons stated in fn. 1 of his decision.

affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The complaint in this proceeding alleges that the Respondent committed three violations of Section 8(a)(5) and (1); an unlawful withdrawal of recognition of the Union as the collective-bargaining representative of the Respondent's unit employees; an unlawful failure to furnish relevant and necessary information requested by the Union; and an unlawful refusal to execute a written contract embodying the collective-bargaining agreement reached by the parties. The judge dismissed the entire complaint based on his finding that the Respondent had a reasonably based, good-faith doubt of the Union's majority status at the time it withdrew recognition. We disagree, finding that the evidence supporting the Respondent's asserted good-faith doubt is insufficient to rebut the presumption of the Union's continuing majority status. Further, we conclude that the Respondent violated Section 8(a)(5) and (1) as alleged in the complaint.

1. Withdrawal of recognition

A 3-year collective-bargaining agreement between the parties expired on 21 May 1979.[3] On 25 May, during the negotiations for a new contract, the Respondent made its last offer to the Union, the parties stipulating that the proposal was for a complete collective-bargaining agreement. On 29 May the Union rejected the Respondent's 25 May offer. About 4 June the Respondent instituted a lockout of all 27 bargaining unit employees. On 12 June the Respondent terminated the lockout and renewed its offer of 25 May.[4] On the same day the Union again rejected the 25 May offer.[5] On 13 June the Union commenced an economic strike which lasted until about 16 July. Of the 27 bargaining unit employees who had previously been locked out, 22 initially took part in the strike, and 5 crossed the picket line to return to work. The record contains no evidence of any picket-line or other strike-related violence or threats during the course of the strike.

[3] All dates are in 1979 unless otherwise indicated. The Union was certified by the Board on 15 April 1970 as the exclusive representative of a unit of the Respondent's production and maintenance employees, and the parties stipulated that this was the unit covered by the agreement which expired 21 May 1979.

Elizabeth Price, the Respondent's director of employee relations, testified that about the time the strike began, she had two discussions with employee Tony Lopez, one of the five who had crossed the picket line. Lopez told Price in these conversations that the Union had done nothing for the employees, and that the Union's business representative was not doing his job. Lopez, not a union member, further stated that he had not paid union dues in the past and would not pay them because he would not support the Union in any way. Also about this time, Price testified that she had a conversation with employee Bill Lee, another of the five who had crossed the picket line at the beginning of the strike. Lee, also not a union member, told Price that he was not paying union dues and did not intend to because he did not support the Union and believed that the Union had not done anything for the employees.

[4] The parties stipulated at the hearing that the legality of the lockout was not at issue, and thus it is not before us. The dates for the beginning and end of the lockout are taken from the record, and we correct the judge's errors in this regard.

[5] Subsequently, on 17 June, the Respondent implemented the wage aspect of its 25 May proposal based on its perception of an impasse in negotiations. This conduct was not alleged as an unfair labor practice.

Price further testified that later, on 19 June, employee and Chief Shop Steward Shady Goodson crossed the picket line to speak with her and Jim Crocker, another management official. Goodson said that he felt he was in the middle of an uncomfortable situation because only the Union itself, and not the employees, wanted the strike. He also stated that he was having difficulties convincing the striking employees to man the picket line and that the Union was not providing enough assistance in maintaining the picket line. He also said that some other striking employees felt the same way that he did.[6] Subsequently, Goodson requested reinstatement, and still later, on 19 July, he resigned from the Respondent's employ.

On 27 June, according to Price's testimony, employee and former shop steward J. R. Blackshire crossed the picket line to request reinstatement. He spoke with Price and Tim Martin, another management official. He expressed anger with the Union because, initially, the Union did not pay him to walk the picket line, and then, when it did, it deducted union dues from the payment. After this discussion, Blackshire went into the Respondent's warehouse to talk to friends who were working there. After a few minutes, he called Price over. He stated that there was no union anymore, that people were not supporting it. He also said that there were other striking employees who wanted to return to work.

Price also testified that in early July, employee Clint Waller crossed the picket line to speak with her and

[6] It is is apparent from the record that Goodson was a member of the Union's negotiating committee as well as a chief shop steward. However, according to the uncontradicted testimony of Crocker, which generally corroborated Price's version of the 19 June meeting, Goodson opened the conversation by stating that he was there on his own and not as a representative of union employees or the Union itself.

Crocker. Waller said that he had not been manning the picket line and would not do it because he was upset with the Union. He stated that he felt that the Union was not representing the employees. He said that he would like "this thing," apparently the strike, to be over with, and he wanted Price and Crocker to know that. He also indicated that the intended to withdraw from membership in the Union and he wanted to know how that would affect his unemployment benefits. Price further testified that subsequently, at some point prior to 20 July, Waller notified the Respondent by telephone that he had resigned from the Union.[7]

On 12 July, according to Price, employee Raymond Brunner crossed the picket line to talk with her and Martin. He stated that he had decided to retire because he did not want to have anything to do with the Union again; he repeated several times during the conversation that he did not want to have to work with the Union any more.[8]

On 16 July the Union, on behalf of the striking employes, made an unconditional offer to return to work, thereby ending the strike. Later on the same day, the Union notified the Respondent that the bargaining unit employees had accepted the Respondent's 25 May collective-bargaining proposal. On 19 July the Union requested that the Respondent provide notification of its availability to execute the collective-bargaining agreement reached between the parties.

A few weeks earlier, on 25 June, the Respondent had hired 29 new employees as permanent replacements for the

[7] On 23 July the Respondent received a letter from Waller, dated 19 July, confirming his earlier telephone message that he had resigned from the Union.

[8] The record is not clear whether or when Brunner actually retired from the Respondent's employ.

22 unit employees on strike.[9] There is no evidence that the Union attempted to contact any of the replacements during the strike. Price testified that, beginning around mid-July, she had individual discussions with 12 or 13 of the replacement employees. On 19 July she spoke with replacement employee David Schneider. Schneider told her that he had worked in situations where he had been a union member and he had worked in nonunion situations and, from what he could see, he did not think that this Union represented the employees, and it just was not needed at the Company.

On 20 July the Respondent, in reply to the Union's 16 July statement of acceptance of the Respondent's last bargaining proposal, notified the Union that that proposal, which the Union had previously rejected, was no longer available. In the same communication, the Respondent stated that it doubted that the Union had the support of a majority of the bargaining unit employees, and on that basis it declined to recognize or bargain with the Union as the employees' representative. Also on 20 July, Robbie Madison, a bargaining unit member when the strike began, resigned from the Respondent's employ. The record does not indicate whether the Respondent knew about or relied on Madison's resignation at the time it withdrew recognition of the Union.

In addition, according to the complaint allegations, about 20 July, the Union requested that the Respondent furnish information regarding the total number of bargaining unit employees then on its payroll and the job classification and seniority date of each such employee. In its answer to the complaint, the Respondent stated that it had received the Union's information request and that thereafter it had refused to provide the information. In its posthearing brief to the judge and in its brief to the Board opposing the General Counsel's exceptions, the Respondent stated that its refusal was based on its doubt of the Union's majority support.

[9] Price testified that 29 replacements were hired although only 22 jobs had been opened up by the strike because the Respondent anticipated that some of the hirees would not cross the picket line, that there would be some turnover within a group of new employees that large, and that additional workmen would be needed during the initial training period. The record indicates that several replacements were terminated within a few weeks.

As of 20 July, the date of the Respondent's withdrawal of recognition, the record indicates that 25 strike replacements and the 5 employees who had initially crossed the picket line were working for the Respondent in the bargaining unit. There were also approximately 20 unit employees who had formerly been strikers and who had requested reinstatement, thus making a total of approximately 50 employees in the unit.[10]

The judge, crediting Price's testimony generally, dismissed the complaint in its entirety on his finding that the Respondent had acquired a reasonable, good-faith doubt of the Union's majority status by 20 July and had accordingly made a valid withdrawal of recognition. In reaching his conclusion, the judge relied on certain of the circumstances related above, and especially the individual statements the employees made to Price. Contrary to the judge, we find the record evidence on which the Respondent depended to support its doubt of the Union's majority status insufficent to justify its withdrawal of recognition.

[10] In the evaluation of a union's continuing majority status, striking employees, even if permanently replaced, and their replacements are included in the bargaining unit. See, e.g., *Whisper Soft Mills v. NLRB*, 754 F.2d 1381 fn. 8 (9th Cir. 1985).

In *Station KKHI*, 284 NLRB No. 113 (July 27, 1987), we had occasion to reaffirm the essential principles controlling this area of the law:

> Absent unusual circumstances, there is an irrebutable presumption that a union enjoys a majority status during the first year following its certification. On expiration of the certification year, the presumption of majority status continues but may be rebutted. An employer who wishes to withdraw recognition after a year may do so in one of two ways: (1) by showing that on the date recognition was withdrawn the union did not in fact enjoy majority status, or (2) by presenting evidence of a sufficient objective basis for a reasonable doubt of the union's majority status at the time the employer refused to bargain.

Id., slip op. at 4 (footnote citations omitted). As previously indicated, the Respondent's defense of its withdrawal of recognition is based on the second method above. The objective, evidentiary factors presented by the Respondent to support its reasonable doubt of the Union's majority status are: the fact that 5 of the original 27 bargaining unit employees crossed the picket line at the beginning of the strike; the resignations from its employment of employees Goodson and Madison; the hiring of 29 strike replacements; and the statements made to Price by employees Goodson, Lopez, Lee, Blackshire, Brunner, Waller, and Schneider, which assertedly demonstrate repudiations of the Union as the employees' collective-bargaining representative.

We note at the outset that the fact that 5 of the 27 unit employees crossed the picket line does not in itself support an inference that the 5 repudiated the Union as the collective-bargaining representative. The failure of employees to join an economic strike may indicate their

economic concerns rather than a lack of support for the union. See, e.g., *NLRB v. Pennco*, 684 F.2d 340, 342 (6th Cir. 1982), cert. denied, 459 U.S. 994 (1982); *Station KKHI*, above, slip op. at 16. Further, Shady Goodson's statements to Price on 19 June, whether speaking for himself or for others, conveyed only a disapproval of the Union's conduct of the strike; he made no broader expression which could be reasonably interpreted as a repudiation of the Union as the employees' representative. See, e.g., *NLRB v. Windham Memorial Hospital*, 577 F.2d 805, 814 (2d Cir. 1978). In addition, Goodson's resignation from employment, as well as Robbie Madison's (assuming the Respondent was aware of it when it withdrew recognition), operated only to reduce by two the size of the bargaining unit as of the date of withdrawal of recognition.

With respect to the Respondent's reliance on the hiring of 29 strike replacements, we note first that there were 25, and not 29, still working when recognition was withdrawn. Concerning the effect of the employment of strike replacements on the overal presumption of the Union's continuing majority status, we stated in *Station KKHI*, above, that we will not use any presumptions with respect to their union sentiments; instead, we will take a case-by-case approach, and we will require additional evidence of a lack of union support on the replacements' part in evaluating the significance of this factor in the employer's showing of good-faith doubt. Id., slip op. at 17-18. In this case, the apparently peaceful picket line the replacements crossed and the Union's apparent failure to contact them during the strike do not provide a basis for inferring their union sentiments, as these matters are "common to the hiring of replacements." Ibid. The only affirmative evidence the Respondent produced regarding any replacement employee's views of the Union is the conversation between

Price and replacement employee Schneider. We treat the content of Schneider's remarks below, but we note at this point that Schneider was one replacement employee, speaking for himself, of a total of 25. Thus, we have no showing with respect to the views of other replacements and no evidentiary basis for reasonably inferring the union sentiments of the replacement employees as a group.[11]

It is apparent that the essence of the Respondent's good-faith doubt defense is the effect of the statements made to Price by employees Blackshire, Lopez, Lee, Brunner, Waller, and Schneider concerning their views of the Union. It may be that some of these statements constituted rejections of the Union as bargaining representative; the import of others, however, appears ambiguous at best. In any event, we see no need to determine whether these statements in fact constitute individual repudiations of the Union as the collective-bargaining representative. Even attributing to them the meaning most favorable to the Respondent, it would merely signify that 6 employees of a total bargaining unit of approximately 50 did not desire to

[11] In *NLRB v. Randle-Eastern Ambulance Service*, 584 F.2d 720 (5th Cir. 1978), the court determined that the employment of strike replacements, as well as the fact that a number of employees renounced the strike and crossed the picket line, contributed to a finding that the company had presented sufficient evidence of its good-faith doubt to make a valid withdrawal of recognition of the union. The Respondent relies on this decision in making its own good-faith doubt contentions. The court in *Randle-Eastern* inferred that the employees did not support the union in light of, inter alia, violence directed against those who crossed the picket line and the union's negotiating position that the strike replacements would have to be discharged to make room for striking employees when the strike was over. Id. at 728. We note that these two circumstances in particular, as well as others the court relied on, are not present in the instant case.

keep the Union as the collective-bargaining representative.[12]

Taking into account all the factors relied on by the Respondent to support its asserted reasonable doubt of the Union's majority status, i.e., the five employees who initially crossed the picket line, the resignations of two employees, the employment of strike replacements, and the individual employee statements concerning the Union, we conclude that the evidence is insufficent to rebut the presumption of the Union's continuing majority status. Accordingly, the Respondent's withdrawal of recognition of the Union on 20 July violated Section 8(a)(5) and (1). See, e.g., *Bickerstaff Clay Products*, 286 NLRB No. 27 (Sept. 30, 1987); *Station KKHI*, supra.

2. Refusal to supply information

Concerning the Respondent's alleged refusal to comply with the Union's 20 July information request, it is clear

[12] With respect to former shop steward Blackshire, to the extent that his remarks to Price on 27 June purported to represent the views of employees other than himself, we assign very little weight to them, because his statement that "people" were not supporting the Union any more was vague, and, more importantly, if we found otherwise, "a few antiunion employees could provide the basis for a withdrawal of recognition when in fact there is actually an insufficient basis for doubting the Union's continued majority." *Golden State Habilitation Convalescent Center*, 224 NLRB 1618, 1619-1620 (1976), enf. denied on other grounds sub nom. *Dalewood Rehabilitation Hospital v. NLRB*, 566 F.2d 77 (9th Cir. 1977); see also *Louisiana-Pacific Corp.*, 283 NLRB No. 161 (May 21, 1987), slip op. at fn. 6 (Chairman Dotson, in dissent, would have dismissed the complaint on the basis of the totality of the evidence), *Silver Spur Casino*, 270 NLRB 1067, 1074-1075 (194). In addition, Blackshire's tenure as a shop steward, having expired prior to the events in this case, provides no basis for imputing to him special knowledge of employees' current union sentiments. See *Louisiana-Pacific Corp.*, supra, slip op. at fn. 6.

from the Respondent's admissions in both its answer to the complaint and its briefs that its conduct in this regard was based on its asserted doubt of the Union's status as the employees' representative. In light of our finding above that the Respondent's withdrawal of recognition of the Union violated the Act, its subsequent refusal to supply the requested information cannot stand. An employer is obligated to provide the employees' bargaining representative with information that is necessary and relevant to fulfill its statutory collective-bargaining function. See generally *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967). A union's information request bearing on the terms and conditions of employment of bargaining unit employees is presumptively relevant. See, e.g., *Fairfield Daily Republic*, 275 NLRB 7 (1985); *Pfizer, Inc.*, 268 NLRB 916 (1984), enfd. 763 F.2d 887 (7th Cir. 1985). Here, the Union specifically requested that the Respondent provide information with respect to the total number of bargaining unit employees on its payroll and each such employee's job classification and seniority date. This information is presumptively relevant and the Respondent's refusal to furnish it to the Union violated Section 8(a)(5) and (1). See, e.g., *Bickerstaff Clay Products Co.*, supra.

3. Refusal to execute the agreement

Regarding the Respondent's alleged refusal to execute a written collective-bargaining agreement, the record is clear that the Respondent proposed a complete collective-bargaining agreement on 25 May. The Union rejected this offer on 29 May and again on 12 June after the Respondent renewed its offer. On 16 July, following an economic strike and the Union's unconditional offer to return to work, the Union stated its acceptance of the 25 May proposal; and on 19 July, the Union requested that the Respondent execute a written contract embodying the agreement reached on the basis of the 25 May proposal. On 20 July, the Respondent informed the Union that the 25 May proposal which the Union had rejected was no longer available for acceptance. The record also clearly indicates that the Respondent never expressly withdrew the 25 May offer prior to the Union's acceptance on 16 July.

The Respondent defends its conduct on grounds of "basic contract law," i.e., the proposition that a contractual offer is terminated on rejection and is not subsequently available to the rejecting party for acceptance. Alternatively, the Respondent asserts that the failure of the strike constituted a change of bargaining circumstances which operated as a withdrawal of the 25 May proposal.

The principles of law in this matter are well established. Technical rules of contract law do not necessarily control regarding the making of collective-bargaining agreements. Generally, a complete collective-bargaining proposal remains viable, even if previously rejected, and, on acceptance, must be executed in accordance with Section 8(d), unless, prior to acceptance, the offer is expressly withdrawn or a change in circumstances leads to a reasonable conclusion that the offer has been withdrawn. *Ben Franklin National Bank*, 278 NLRB No. 136 (Mar. 17, 1986), JD slip op. at 13 and cases there cited. Here, the 25 May offer, although twice rejected, was never expressly withdrawn and remained open for acceptance as of 16 July. On that date the Union did accept the 25 May offer, the parties thereby reaching agreement on a complete collective-bargaining contract. The apparent failure of the strike did not amount to a change in negotiating circumstances sufficient for the parties reasonably to view the proposal as effectively withdrawn. See, e.g., *Pepsi Cola Bottling Co. v. NLRB*, 659 F.2d 87, 90 (8th Cir. 1981); *Ben Franklin National Bank, supra, JD slip op.*

at 16.[13] On 19 July the Union requested execution of a written contract incorporating the agreement reached, thus activating the Respondent's 8(d) duty to do so. By refusing to execute a written contract the Respondent violated Section 8(a)(5) and (1). *Bickerstaff Clay Products Co.*, supra; *Ben Franklin National Bank,* supra.

Conclusions of Law

1. Respondent Curtin Matheson Scientific, Inc. is an employer whose operations affect commerce within the meaning of Section 2(6) and (7) of the Act.

2. General Drivers, Warehousemen and Helpers, Local 968, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. On 15 April 1970 the Union was certified by the Board as the exclusive collective-bargaining representative of the employees employed in the following described unit appropriate for the purposes of collective bargaining:

> All production and maintenance employees, including truck drivers and city sales employed at 4220 Jefferson, Houston, Texas. Excluded are all other employees, including office clerical employees, service repairmen, telephone sales, outside salesmen, guards, watchmen, laboratory personnel, and supervisors as defined in the Act.

[13] Cf., *NLRB v. Randle-Eastern Ambulance Service*, above, relied on by the Respondent, in which the court, rejecting a bad-faith bargaining theory, found that the company had not violated the Act by *expressly withdrawing* its previous proposals in light of a change in relative bargaining strengths in the context of a strike.

4. By withdrawing recognition of the Union as the representative of the employees in the unit described above on 20 July 1979, the Respondent violated Section 8(a)(5) and (1) of the Act.

5. By failing and refusing to furnish the Union with the information requested by it on or about 20 July, the Respondent violated Section 8(a)(5) and (1) of the Act.

6. By failing and refusing to execute a written contract embodying the collective-bargaining agreement reached by the parties on 16 July 1979, the Respondent violated Section 8(a)(5) and (1) of the Act.

7. The unfair labor practices above constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

To remedy the Respondent's unlawful withdrawal of recognition of the Union, we shall order the Respondent to recognize and, on request, bargain with the Union concerning the terms and conditions of employment of the bargaining unit employees. To remedy the Respondent's unlawful refusal to provide the information requested by the Union, we shall order the Respondent to provide the specific information sought by the Union on or about 20 July 1979, if the Union so requests.

With respect to the Respondent's unlawful refusal to execute the agreement reached on 16 July 1979, it is apparent that that agreement will have expired prior to the issuance of this decision. Accordingly, to remedy effectively the unfair labor practices found herein, we shall order the Re-

spondent to execute that agreement, if the Union so requests, and give retroactive effect to its terms and conditions, and make the bargaining unit employees whole for losses, if any, they may have suffered as a result of its refusal to sign such agreement,[14] backpay for employees to be computed in accordance with the method stated in *Ogle Protection Service*, 182 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest to be computed in the manner prescribed in *New Horizons for the Retarded.*[15] We shall further order that if the Union does not request that the Respondent execute the agreement reached on 16 July 1979, the Respondent shall, on request, bargain in good faith with the Union concerning the terms and conditions of an agreement, and, if an agreement is reached, execute a written contract incorporating such agreement. See, e.g., *Parkview Furniture Mfg. Co.*, 284 NLRB No. 105 (July 13, 1987); *Worrell Newspapers*, 232 NLRB 402 (1977).

ORDER

The National Labor Relations Board orders that the Respondent, Curtin Matheson Scientific, Inc., Houston, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

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[14] We note here, for its possible effect on our make-whole remedy, the Respondent's implementation of the wage aspect of its final offer on 17 June 1979.

[15] In accordance with our decision in *New Horizons for the Retarded,*, 283 NLRB No. 181 (May 28, 1987), interest on and after 1 January 1987 shall be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest on amounts accrued prior to 1 January 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621) shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).

(a) Refusing to bargain by withdrawing recognition of the Union as the exclusive bargaining representative of the Respondent's employees in the following unit:

> All production and maintenance employees, including truck drivers and city sales employed at 4220 Jefferson, Houston, Texas. Excluded are all other employees, including office clerical employees, service repairmen, telephone sales, outside salesmen, guards, watchmen, laboratory personnel, and supervisors as defined in the Act.

(b) Refusing to bargain by refusing to furnish the information requested by the Union about 20 July 1979 concerning the total number of bargaining unit employees on its payroll and the job classification and seniority date of each such employee.

(c) Refusing to bargain by refusing to execute a written contract embodying the collective-bargaining agreement reached between the parties on 16 July 1979.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize the Union as the exclusive collective-bargaining representative of the employees in the unit set out above and bargain in good faith with the Union at its request concerning the unit employees' terms and conditions of employment.

(b) Furnish the Union on request the information it sought on or about 20 July 1979.

(c) On request, sign a collective-bargaining agreement containing the terms and conditions of employment agreed to between the Respondent and the Union on 16 July 1979 and give retroactive effect to its terms and

conditions, and make its employees whole, with interest, for losses, if any, they may have suffered as a result of its refusal to sign such agreement.

(d) If no such request is made, bargain collectively in good faith with the Union, at its request, over the terms and conditions of a new collective-bargaining agreement and, if an agreement is reached, sign a written contract embodying such agreement.

(e) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Post at its Houston, Texas facility copies of the attached notice marked "Appendix."[16] Copies of the notice, on forms provided by the Regional Director for Region 23, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

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[16] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Dated, Washington, D.C. 16 December 1987

Donald L. Dotson, Chairman

James M. Stephens, Member

Mary Miller Cracraft, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT withdraw recognition of the Union, General Drivers, Warehousemen and Helpers, Local 968, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, as the exclusive collective-bargaining representative of our employees in the following unit:

> All production and maintenance employees, including truck drivers and city sales employed at 4220 Jefferson, Houston, Texas. Excluded are all other employees, including office clerical employees, service repairmen, telephone sales, outside salesmen, guards, watchmen, laboratory personnel, and supervisors as defined in the Act.

WE WILL NOT refuse to furnish the information requested by the Union about 20 July 1979 concerning the total number of bargaining unit employees on the payroll and the job classification and seniority date of each such employee.

WE WILL NOT refuse to execute a written contract embodying the collective-bargaining agreement reached between ourselves and the Union on 16 July 1979.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL recognize the Union as the exclusive collective-bargaining representative of the employees in the unit set out above and WE WILL bargain in good faith with the Union on request concerning the unit employees' terms and conditions of employment.

WE WILL furnish the Union on request the information it requested on or about 20 July 1979.

WE WILL, on request, sign a collective-bargaining agreement containing the terms and conditions of employment agreed to between ourselves and the Union on 16 July 1979, WE WILL give retroactive effect to its terms and conditions, and WE WILL make the unit employees whole, with interest, for losses, if any, they may have suffered as a result of our refusal to sign such agreement.

WE WILL, if no such request is made, bargain collectively in good faith with the Union, on its request, over the terms and conditions of a new collective-bargaining agreement and, if an agreement is reached, WE WILL sign a written contract embodying such agreement.

CURTIN MATHESON SCIENTIFIC, INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Bob Casey Federal Building/Courthouse, Room 4014, 515 Rusk Street, Houston, Texas 77002, Telephone 713-229-7755.

UNITED STATES OF AMERICA
BEFORE
THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
BRANCH OFFICE
SAN FRANCISCO, CALIFORNIA

Case No. 23-CA-7620

CURTIN MATHESON SCIENTIFIC, INC.

and

GENERAL DRIVERS, WAREHOUSEMEN & HELPERS, LOCAL 968, AFFILIATED WITH INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA

Bernard L. Middleton and *Ernest Duran,* for the General Counsel.
Howard Reed, of Houston, Texas, for the Union.
Andrews, Kurth, Campbell & Jones, by *Clinton S. Morse* and *Donald Horton,* of Houston, Texas, for Respondent.

DECISION

Statement of the Case

MARTIN S. BENNETT, Administrative Law Judge: This matter was heard at Houston, Texas on June 10, 1980.

The complaint, issued September 7 and based upon a charge filed July 30, 1979, by General Drivers, Warehousemen & Helpers, Local 968, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, herein the Union, alleges that Respondent, Curtin Matheson Scientific, Inc. has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act. Able briefs have been submitted by the General Counsel and Respondent.[1]

Upon the entire record in the case, and from my observation of the witnesses including their demeanor, I make the folowing:

Findings of Fact

I. Jurisdictional Findings

Curtin Matheson Scientific, Inc. is a Delaware corporation with its principal office and place of business located in Houston, Texas where it is engaged in the business of buying and selling laboratory instruments and supplies. It annually purchases and receives goods and materials valued in excess of $50,000 which are shipped to its facilities in Texas directly from points located outside that State. I find that the operations of Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organization Involved

General Drivers, Warehousemen & Helpers, Local 968, affiliated with International Brotherhood of Teamsters,

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[1] A motion by the General Counsel to amend the complaint, initially raised in its brief, without any advance notice of any nature, is hereby denied because, as later urged by Respondent, I deem this to constitute a lack of due process.

Chauffeurs, Warehousemen & Helpers of America is a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

A. *Introduction*

Attacked herein is the fact that, after rejecting an offer of a contract by Respondent, the Union thereafter changed its mind, and decided to accept said contract. Further attacked is the fact that Respondent next refused to execute such a written contract, withdrew recognition from the Union, and attacked its representative status on the basis that it had a good-faith doubt of its majority representation. Accompanying the foregoing is the fact that Respondent thereafter refused to submit certain information to the Union with respect to the total number of bargaining unit employees, their classifications and their seniority dates. In essence, this comes down to whether, on the dates crucial herein, Respondent entertained a good-faith doubt as to the representative status of the Union among its employees.[2]

A strike commenced on June 13, 1979[3] and the parties on the record stipulated that on June 14 there was a legal lockout of the strikers by Respondent which is not in issue herein.[4]

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[2] The unit involved includes all production and maintenance employees, including truck drivers and city sales employees at Houston, but excludes all other employees including office clericals, service repairmen, telephone sales personnel, outside salesmen, guards, watchmen, laboratory personnel, and supervisors. The appropriateness of this unit within the meaning of Section 9(b) of the Act is not denied and I so find.

[3] All dates are in 1979, unless otherwise indicated.

[4] Page 28 of the transcript.

The parties met again on June 12, Respondent renewed its last contract offer of May 25 and also notified the Union that the lockout was threatened as of that date. This led to the strike of June 13.

On July 16 the Union notified Respondent that the employees had voted to accept Respondent's offer of May 25. The parties agreed that although the Union was still the exclusive bargaining representative as of June 12 and that as of July 19 the Union requested Respondent to execute the contract embracing its last rejected offer; Respondent has refused to do so since July 20.

There is substantial evidence, which I credit, that five of the bargaining unit employees crossed the picket line and attempted to return to work.

Early in the strike, Elizabeth Price, Director of Employee Relations, in my observation a most forthright and credible witness, commenced receiving reports about employee dissatisfaction with the Union and, moreover, a desire not to be represented by said labor organization.

Price testified that Tony Lopez, who crossed the picket line, had volunteered that the Union was doing nothing for the employees and that Business Agent Reed was not representing the employees adequately. Several days later Lopez expressed an opinion as to Reed's lack of ability in regulating the employees.

Employee Bill Lee has crossed the picket line and volunteered to Price his dissatisfaction with the Union and its representation of the employees; Price so testified and I credit her testimony. Lee further testified that Chief Shop Steward Goodson requested a meeting with Jim Crocker of Respondent's International Division. Goodson crossed the picket line and met with Price and Crocker in the office of the latter. He expressed himself to the effect that Business Agent Reed wanted to strike and that the Union had difficulty manning the picket line. Price, as the record

reflects, and I so find, made immediate notes of this meeting.

On June 25, Respondent hired 29 new employees replacing all of the 22 or 23 strikers who had totaled some 27 in the bargaining unit. Respondent understandably anticipated some termination in the replacements.

On June 27 former shop steward J. R. Blackshire requested a meeting with Price. He duly met with her and Tim Martin. He expressed concern over the fact that he had been on vacation when the lockout commenced and expressed dissatisfaction with the fact that the Union was not paying people to picket. He stated further that the Union was doing nothing for the employees and that he could not "support" such a labor organization. Indeed, at the end of the meeting he requested reinstatement. I hardly deem this to constitute evidence of his support of this labor organization and so find.

B. *Discussion*

The issue in this case is whether Respondent had a good-faith doubt of the Union's majority status at the time Respondent withdrew recognition of the Union. The current thinking of the courts, and to some extent the Board, honors the good-faith doubt defense to a Section 8(a)(5) unfair labor practice charge. In view of the plethora of cases where various Circuit Courts have found that defense applicable.[5] [*sic*] I am constrained to accept Respondent's defense.

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[5] See, e.g., District of Columbia Circuit hearing a Florida case in *Peoples Gas System, Inc.* v. *N.L.R.B.*, __ F.2d __, 104 LRRM 2224 (C.A. D.C., 1980); Fifth Circuit in *N.L.R.B.* v. *Randle-Eastern Ambulance Service, Inc.*, 584 F.2d 720 (C.A. 5, 1978); Seventh Circuit in *Bellwood General Hospital, Inc.* v. *N.L.R.B.*, 627 F.2d 98 (C.A. 7, 1980) and *N.L.R.B.* v. *Key Motors Corp.*, 579 F.2d 1388 (C.A. 7, 1978); Eighth Circuit in *National Car Rental Systems, Inc.* v. *N.L.R.B.*, 594 F.2d 1203 (C.A. 8, 1979); Ninth Circuit in *Golden State Habilitation Center* v. *N.L.R.B.*, 556 F.2d 77 (C.A. 9, 1977); Tenth Circuit in *Burns International Security Services* v. *N.L.R.B.*, 567 F.2d 945 (C.A. 10, 1977).

The Board has also recognized the defense. See, e.g., *Upper Mississippi Towing Corp.*, 246 NLRB No. 41 (1979); *Cadillac Manufacturing Corp.*, 232 NLRB 586 (1977); and *Arkay Packaging Corp.*, 227 NLRB 397 (1976).

It is well established that the majority status of a union is conclusively presumed to continue for one year after the union is certified. After the certification year has ended a union enjoys a rebuttable presumption that its majority status continues and this presumption applies after the expiration of the collective-bargaining agreement. In refusing to bargain with a union after the expiration of the first year following certification, an employer violates Section 8(a)(5) unless it can overcome the presumption of majority support by affirmatively establishing that either (1) at the time of the withdrawal of recognition the union had lost its majority status, or (2) the employer had, in good faith, a reasonably-based belief that the union had lost its majority status, and that such belief was based on objective considerations and was raised in a context free of employer unfair labor practices.[6]

The Union was certified as the exclusive collective-bargaining representative of Respondent's production and maintenance employees on April 15, 1970. The last collective-bargaining agreement between the Union and Respondent expired on May 21, 1979. Therefore the Union enjoyed a rebuttable, as opposed to an irrebuttable, pre-

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[6] *Brooks* v. *N.L.R.B.*, 348 U.S. 96 (1954); *N.L.R.B.* v. *Randle-Eastern Ambulance Service, Inc.*, *supra*; *Burns International Security Services* v. *N.L.R.B.*, *supra*, and *Celanese Corporation of America*, 95 NLRB 664, 673 (1951).

sumption of majority status. Respondent does not claim to rebut the presumption by the first method stated above (i.e., that the Union had, in fact, lost its majority status), but instead relies on the second method of rebuttal—that it had a reasonably-based, good-faith doubt of the Union's majority status.

Counsel for the General Counsel contends that Respondent did not have a reasonably-based, good-faith doubt of the Union's majority status. There is no assertion that the defense was raised in a context of employer unfair labor practices; in fact, there is no allegation that Respondent committed any independent unfair labor practices.

I conclude that events both prior and subsequent to the Union's July 16 attempt to accept Respondent's May 25 proposals rebut the presumption of majority status. I find that these events were sufficient to establish a reasonably-based, good-faith doubt of the Union's majority status.[7]

By June 27 Respondent based its doubt on several facts. On June 13 five[8] of the 27 old bargaining unit employees crossed the picket line, 2 of those 5 expressed nonsupport for the Union.[9] Shady Goodson[10] reported to Respondent that the employees did not support the strike, that they felt the strike was based on the hostility of the Union's Business Agent, Howard Reed, and that the Union had difficulty manning the picket line. On June 27 former Shop

[7] Much of the evidence on this subject is based on the testimony or notes of Elizabeth Price. Price impressed me as a forthright and credible witness and I credit her testimony.

[8] The five were Bill Lee, Tony Lopez, Gilbert Ozuniga, Sandra Hutto, and Alvin Harper.

[9] Bill Lee and Tony Lopez.

[10] Goodson was the Chief Shop Steward and a member of the Union's Negotiating Committee.

Steward J. R. Blackshire met with Price at Respondent's offices and stated that he did not support the Union, that the Union had lost the support of the employees in the unit, and that he and many others wanted to return to work.[11] On June 28 Goodson made an unconditional request for reinstatement.

In the early part of July two other employees expressed strong dissatisfaction with the Union. On July 11 Raymond Brunner met with Price and Respondent's representative Tim Martin. Brunner stated that he wanted to retire because he did not want to work with the Union again. Also in the first part of July Clint Waller met with Price and Jim Crocker, Operations Manager of the International Division, at which he also expressed strong dissatisfaction with the Union and stated his desire to withdraw from membership. On July 19 Waller sent a confirming letter to Price's office that confirmed his lack of support for the Union. The letter included a copy of a letter addressed to the Union, dated July 19, which stated in part, "I wish not to be a member of the Teamsters no longer at Curtin Matheson Scientific, Inc. or anywhere else."[12]

Three other events occurred after the Union attempted acceptance of Respondent's May 25 proposals, and before Respondent withdrew recognition on July 20. Goodson resigned on July 19. Also on July 19, striker replacement David Schneider told Price that the Union did not support the employees. On July 20, Robbie Madison resigned.

Based on the foregoing findings of fact, I conclude that Respondent had a reasonably-based, good-faith doubt of

[11] Blackshire made several statements to the effect that "there wasn't a Union anymore" and that the Union "had lost all their support from the employees in the unit." [Tr. p. 40]

[12] Respondent's Exh. 10(b).

the Union's majority status. I therefore recommend dismissal of the complaint.

Conclusions of Law

1. Curtin Matheson Scientific, Inc. is an employer whose operations affect commerce within the meaning of Section 2(6) and (7) of the Act.
2. General Drivers, Warehousemen & Helpers, Local 968, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent has not engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[13]

ORDER

The complaint is dismissed in its entirety.

Dated: November 20, 1980

/s/ Martin S. Bennett
MARTIN S. BENNETT
Administrative Law Judge

[13] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions and Order, and all objections thereto shall be deemed waived for all purposes.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 88-4012

CURTIN MATHESON SCIENTIFIC, INC.,
PETITIONER CROSS-RESPONDENT

versus

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT CROSS-PETITIONERS

PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

[Entered Nov. 4, 1988]

JUDGMENT

Before WILLIAMS and GARWOOD, Circuit Judges, and NOWLIN,* District Judge.

On November 4, 1988, being fully advised in the premeses [*sic*], the Court handed down its decision denying enforcement of the Board's order.

ON CONSIDERATION WHEREOF, It is hereby ordered and adjudged that enforcement of the said order of the National Labor Relations Board be denied.

IT IS FURTHER ORDERED that each party shall bear its own costs on appeal.

WILLIAMS, Circuit Judge, dissenting.

* District Judge of the Western District of Texas, sitting by designation.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 88-4012

CURTIN MATHESON SCIENTIFIC, INC.,
PETITIONER CROSS-RESPONDENT

versus

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT CROSS-PETITIONER

PETITION FOR REVIEW OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

ON SUGGESTION FOR REHEARING EN BANC
(Opinion November 4, 5 Cir., 1988, __ F.2d __)

[Filed Dec. 22, 1988]

Before WILLIAMS, GARWOOD and [*sic*] Circuit Judges and NOWLIN*, District Judge.

PER CURIAM:

(X) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc

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* District Judge of the Western District of Texas, sitting by designation.

(Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ J.S. WILLIAMS
United States Circuit Judge

APPENDIX E

UNITED STATES OF AMERICA
BEFORE
THE NATIONAL LABOR RELATIONS BOARD

Case 20–CA–15817

BUCKLEY BROADCASTING CORPORATION OF CALIFORNIA, d/b/a STATION KKHI

and

NATIONAL ASSOCIATION OF BROADCAST EMPLOYEES & TECHNICIANS, LOCAL 51, AFL-CIO

[July 27, 1987]

DECISION AND ORDER

On 30 September 1981 Administrative Law Judge David G. Heilbrun issued the attached decision. The Respondent filed exceptions and a supporting brief, and the Charging Party filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions as modified herein and to adopt the recommended Order.

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[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products,* 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. We have further considered the Respondent's implied contention that the judge has evidenced a bias or at least an appearance of bias in this proceeding. We have carefully considered the record and attached decision and find these charges of bias unsupported and without merit.

The judge found that Respondent did not have sufficient objective considerations to support its asserted good-faith doubt of the Union's majority status and therefore that its November 1980 withdrawal of recognition violated Section 8(a)(5) and (1) of the Act. While we adopt the judge's conclusions, we do so for the following reasons.

The facts are essentially not in dispute and are set forth in greater detail by the judge. The Union and the Respondent have had a collective-bargaining relationship for a number of years. Contract negotiations pursuant to the Union's timely notice of reopening were begun before the 1 February 1978 expiration of the most recent collective-bargaining agreement. A primary stumbling block in negotiations was the Respondent's desire to institute "combo," i.e., assignment of engineering and announcing work to one on-air employee, rather than the historical practice of having separate employees perform each function. The parties' disagreement on this issue led to impasse on 22 August 1979, after which the Respondent implemented its final offer. When negotiations resumed in September 1979, the Union was willing to accept the concept of combo if its member employees were assigned to do the work. The Respondent, however, wished to assign the work to its employees represented by the American Federation of Television and Radio Artists (AFTRA). The Respondent's five employees represented by the Union struck on 12 November 1979.

When, pursuant to its final offer, the Respondent began assigning combo work to its AFTRA-represented employees, the Union instituted proceedings against AFTRA pursuant to jurisdictional dispute procedures set forth in article XX of the AFL-CIO constitution. In October 1980 the proceedings were concluded in favor of the Union.

During the period between the commencement of the strike and the conclusion of the article XX proceedings, the Union made no attempt to resume negotiations with the Respondent. In support of its bargaining position, the Union sought to induce advertisers away from the Respondent, an endeavor that in at least one case was successful. In the meantime, the Respondent hired permanent replacements for the five strikers, and two of the strikers resigned their positions with the Respondent.

Upon resolution of the jurisdictional dispute, the Union sent a letter dated 30 October 1980 to the Respondent requesting bargaining in light of the "changed circumstances." By letter dated 6 November 1980, the Respondent withdrew recognition from the Union. In so doing it denied the Union's assertion that it was the exclusive representative of the Respondent's engineering and technical employees, rejected the Union's reliance on the AFL-CIO proceeding as creating "changed circumstances" for negotiations, and cited the substantial period of time between the expiration of the collective-bargaining agreement and the Union's request for further negotiations.

In addressing the Respondent's claim of good-faith doubt of the Union's majority status, the judge rejected as a matter of law the basis for its asserted good-faith doubt put forth by the Respondent in its 6 November 1980 letter, i.e., the passage of time between the expiration of the collective-bargaining agreement in February 1978 and the Union's 30 October 1980 letter. In addition, the judge addressed the Respondent's alternative contention that its

asserted good-faith doubt is supported by its hiring of permanent replacements for the strikers and strengthened by the fact that two of the strikers resigned. The judge rejected this argument as well, relying on the presumption that strike replacements support the union in the same ratio as the strikers, and further finding that the Respondent presented no actual evidence that the strike replacements were opposed to representation by the Union.[2] Accordingly, the judge concluded that the Respondent's withdrawal of recognition violated Section 8(a)(5) and (1).

In its exceptions the Respondent argues, inter alia, that under the circumstances of this case the presumption regarding striker replacements is inapplicable, and asserts that the facts support its good-faith doubt. We consider the presumption concerning strike replacements below.

Absent unusual circumstances, there is an irrebuttable presumption that a union enjoys majority status during the first year following its certification.[3] On expiration of the certification year, the presumption of majority status continues but may be rebutted.[4] An employer who wishes to withdraw recognition after a year may do so in one of two ways: (1) by showing that on the date recognition was withdrawn the union did not in fact enjoy majority status, or (2) by presenting evidence of a sufficient objective basis for a reasonable doubt of the union's majority status at the time the employer refused to bargain.[5]

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[2] The Respondent introduced affidavits of the five strike replacements stating only that they had never been contacted during the strike by the Union.

[3] *Ray Brooks v. NLRB,* 348 U.S. 96, 98-104 (1954).

[4] *Celanese Corp. of America,* 95 NLRB 664 (1951), cited with approval in *Ray Brooks,* supra.

[5] *Retired Persons Pharmacy v. NLRB,* 519 F.2d 486 (2d Cir. 1975), enfg. 210 NLRB 443 (1974); *Allied Industrial Workers Local 289 v. NLRB,* 476 F.2d 868 (D.C. Cir. 1973), enfg. 192 NLRB 290 (1971);

The presumption of continuing majority status serves two important functions: first, it promotes continuity in bargaining relationships, i.e., gives the relationship "some measure of permanence,"[6] and, second, the presumption protects the express statutory right of employees to designate a collective-bargaining representative of their own choosing, and prevents an employer from impairing that right without objective evidence that the representative the employees have designated no longer enjoys majority support.[7] There is, in effect, a corollary to the presumption of continuing majority status which is that the Board presumes that, generally, at least a majority of *new* employees support the union.

In *Pennco, Inc.*,[8] the Board reaffirmed a more controversial and less established presumption concerning union majority, i.e., that permanent strike replacements hired during a strike support the union in the same ratio as the striking employees whom they replaced.[9] It is this pre-

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Terrell Machine Co. v. NLRB, 427 F.2d 1088 (4th Cir. 1970), enfg. 173 NLRB 1480 (1969).

[6] *NLRB v. Century Oxford Mfg. Corp.*, 140 F.2d 541, 542 (2d Cir. 1944), enfg. 47 NLRB 835 (1943). Chairman Dotson acknowledges the importance of continuity in bargaining relationships, but does not necessarily accord it absolute supremacy in all contexts. See his and former Member Dennis' joint dissent in *Gibbs & Cox,* 280 NLRB No. 110 (June 24, 1986) (withdrawal of recognition in a separately recognized unit which was assertedly "merged" into a larger overall unit).

[7] *Pennco, Inc.*, 250 NLRB 716 (1980), enfd. 684 F.2d 340 (6th Cir.), cert. denied 459 U.S. 994 (1982). See also *Fall River Dyeing & Finishing Corp.* v. *NLRB,* 55 LW 4706 (June 6, 1987).

[8] Supra, 250 NLRB 716.

[9] In approving this presumption of strike replacement support for the union, the Board in *Pennco* simultaneously rejected a contrary presumption, urged by the employer in that case, that strike replacements and nonstriking employees *oppose,* or do not support, the union. As discussed more fully below, we continue to reject such a

sumption that we scrutinize and ultimately abolish, for the reasons discussed below.

As a matter of policy, there is no warrant for a presumption of strike replacement support for an incumbent union. Indeed, prior to 1975, there was no such presumption. In *Jackson Mfg. Co.*,[10] the panel majority affirmed the trial examiner's dismissal of an allegation that the employer had unlawfully withdrawn recognition from the union during a strike, following the hiring of replacements for all the striking employees. More specifically, the panel adopted the following rationale of the trial examiner:

> General Counsel's contention that Respondent unlawfully refused to bargain with the Union on and after June 10, 1958, rests upon the assumption that the Union's majority status established by consent of the parties following a card check in August 1957, continued unaffected throughout the duration of the strike and regardless of the fact that the strikers had been permanently replaced. This contention would prevail, and General Counsel so concedes in his brief to me, only if the strikers retained their employee status throughout the entire period, being entitled to immediate reinstatement upon application at the close of the strike. As I have concluded that under the circumstances of this case the strike was an economic one and not an unfair labor practice strike as urged by General Counsel, it is evident that no replaced striker retained his employee status. Consequently, at the time of its demands for resumption of bargaining, on June 9, 1958, it is doubtful that the Union represented anything near a majority of the employees, unless it

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presumption of strike replacement opposition to or nonsupport of the union.

[10] 129 NLRB 460 (1960).

could be shown (as it was not) that the replacements hired during the strike had chosen the Union to represent it—a most improbable situation.[11]

In *S & M Mfg. Co.*,[12] the panel majority of then Members Brown and Jenkins stated that the validity of any finding of unlawful refusal to bargain on the part of an employer depends on the existence of majority support for the union on the date of the employer's refusal to bargain. There, the employer effectively refused to bargain further with the union on a certain date, without, however, questioning the union's majority status. The panel majority found that on the date of the employer's refusal to bargain, the only employees working were returning strikers who had resigned from the union or newly hired employees who had crossed the union's picket line to go to work and who were "not shown to have manifested their support of the Union." Thus, the panel majority was unable to find that there were *any* union adherents among the employees working on the date the employer effectively refused to bargain. In dissent, then Member Fanning argued that:

> [A]n established bargaining representative which, as here, goes on strike with the support of all employees should be entitled to a presumption of continuing majority status, at least until it is challenged by the Company or put to the test in a Board election.[13]

Nevertheless, the panel majority dismissed the allegation of unlawful refusal to bargain, finding that the General

[11] Id. at 477-478. We cite this case only as an indication that the presumption that strike replacements support the union is not long held, and do not pass on other findings made by the trial examiner.

[12] 172 NLRB 1008 (1968).

[13] Id. at 1009-1010.

Counsel had failed to satisfy his burden of establishing that the union enjoyed majority status on the date the employer refused to bargain with the union.

In *Peoples Gas System,*[14] the Board found that the employer lawfully withdraw [*sic*] recognition from the incumbent union on the basis of the employer's reasonable doubt of the union's continued majority status, which reasonable doubt was itself based on, inter alia, the fact that 40 percent of the employees had been permanently replaced during an economic strike which occurred 3 years prior to the employer's withdrawal of recognition.[15] In this regard, the Board stated:

> While it is of course possible that the [strike] replacements, who had chosen not to engage in the strike activity, might nevertheless have favored union representation, it was not unreasonable for [the] Respondent to infer that the degree of union support among these employees who had chosen to ignore a Union-sponsored picket line might well be somewhat weaker than the support offered by those who had vigorously engaged in concerted activity on behalf [of] Union-sponsored objectives.[16]

Thus, the Board in *Peoples Gas* continued to refrain from creating any presumptions about the pro- or antiunion sympathies of strike replacements.

[14] 215 NLRB 944 (1974).

[15] Also, there had been a 17-percent accretion to the unit after the strike, with none of the accreted employees signing union authorization cards, and there was an approximately 35-percent turnover of employees during the 8-month period prior to the employer's withdrawal of recognition.

[16] 214 NLRB at 947.

However, in *Cutten Supermarkets,*[17] the Board, without any supporting rationale or citation to apposite precedent, implied in dictum that strike replacements are presumed to support the union in the same ratio as those whom they have replaced. In that case, the employer withdrew recognition from the union, asserting that it possessed a reasonable doubt, based on objective considerations, of the union's continued majority status. More specifically, on the date that the employer withdrew its recognition of the union, its employee complement consisted of four striking employees, three strike replacements, and the nonstriking assistant manager (who the employer asserted was a bargaining unit employee, and not a supervisor within the meaning of Section 2(11) of the Act, and who was, therefore, assertedly includable in the employer's computations of employee support for the union).

In rejecting the employer's assertion of reasonable doubt about the union's continued majority status, the Board found that the nonstriking assistant manager was a supervisor, and not a rank-and-file employee whose union sentiments could properly be considered in determining whether the union continued to enjoy the support of a majority of the bargaining unit employees. Thus, the Board found that on the date that the employer withdrew its recognition of the union, there were seven employees in the unit: four striking employees and three strike replacements. As to the strike replacements, the Board correctly stated that there was no presumption that strike replacements and nonstriking employees were *opposed* to the union. The Board also found that the employer had produced no affirmative evidence to support its contention that the strike replacements and nonstriking individual

[17] 220 NLRB 507 (1975).

were opposed to the union. However, with reference to the strike replacements, the Board inexplicably stated:[18]

> Indeed, it is a well-settled principle that *new employees* are presumed to support the union in the same ratio as those whom they have replaced.[11]

[11] *True Temper Corp.*, 217 NLRB [1120] (1975); *Maywood Packing Co.*, 181 NLRB 778, 781 (1970); *Laystrom Manufacturing Co.*, [151 NLRB 1482 1482 (1965)].

Apparently, this was the first time that the Board linked the presumption on *new employee* (i.e., normal economic turnover) support for an incumbent union to strike replacements. We emphasize that the Board did so in dictum and without rational [*sic*] or precedent. First, the cases relied on by the Board in footnote 11 of the excerpted passage above involved new employees in the course of normal economic turnover, and not strike replacements.

Second, the Board summarized the evidence of support for the union is *Cutten Supermarket* as follows: "four strikers who clearly supported the Union and *three replacements whose union sentiments were not known.*" 220 NLRB at 509 (emphasis added). Thus, notwithstanding its apparent earlier linkage of the presumption of new employee support for an incumbent union to strike replacements in this case, the Board clearly did not actually *apply* any such presumption of strike replacement support for the union to the facts before it.

In any event, in *Beacon Upholstery Co.*,[19] the Board found that the employer had lawfully withdrawn recognition from the union on the basis of a reasonable doubt that the union enjoyed the majority support of the em-

[18] *Cutten Supermarket*, 220 NLRB at 509 (emphasis added).

[19] 226 NLRB 1360 (1976).

ployees. On the date of the employer's withdrawal of recognition, there were 13 employees in the bargaining unit: 10 strike replacements and 3 employees who had had not gone on strike. Thirteen striking employees had been lawfully discharged 4 days before the employer's withdrawal of recognition. The administrative law judge, affirmed without comment by the Board, found that the employer had rebutted the presumption of continued majority support for the union flowing from the recently expired collective-bargaining agreement simply by establishing that the only employees in the bargaining unit as of the date of the employer's withdrawal of recognition were 3 nonstrikers and 10 strike replacements (all 13 of the striking employees having been lawfully discharged prior to the withdrawal of recognition). The judge stated: "Under these circumstances I do not believe that it can be presumed that the strike replacements supported the Union in the same ratio as the discharged strikers."[20]

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[20] Id. at 1367-1368. The chairman notes that the judge did note that the Board in *Cutten Supermarket,* supra, had applied *to strike replacements* the presumption that new employees support the union in the same ratio as those they replaced. In not applying that presumption to the strike replacements in *Beacon Upholstery,* the judge found that the striking employees in *Beacon Upholstery,* unlike those in *Cutten Supermarket,* had been discharged, and that therefore "the Union's loyalty lay with [the discharged strikers, whose interests] were diametrically opposed to those of the strike replacements." He finds this proposition to be no less applicable in the case of *undischarged* strikers, such as those in *Cutten Supermarkets,* and he finds the two cases in question not materially distinguishable in that regard. In any event, however, he finds that the judge in *Beacon Upholstery* was correct in not applying *to strike replacements* the presumption that new employees in a *normal turnover* situation support the union in the same ratio as those they replaced. In this regard, he rejects rather than tries to distinguish, the application of this presumption to the strike replacements in *Cutten Supermarket.* As indicated above, he finds

About 15 months after *Cutten Supermarket*, and only 2 weeks after *Beacon Upholstery*, the Board again addressed the issue presumptive support for or opposition to a union on the part of strike replacements in *Arkay Packaging Corp.*[21] There, a panel majority found that the employer lawfully withdrew recognition from three unions on the basis of its reasonable doubt about the continued majority status of those unions. The majority expressly affirmed the adminstrative law judge's finding that the unions' *presumptive* majority status flowing from their collective-bargaining agreements had been rebutted by the fact that the unions failed to respond at all to the employer's written notifications to the unions and to the striking employees that the latter would be permanently replaced if they did not return to work by a specified date; the striking employees were, in fact, permanently replaced; and the unions made no attempt to contact the employer or monitor the application of the still-current collective-bargaining agreements during the strike. Thus, the judge found, and the Board panel majority expressly agreed, that:

> It is reasonable to conclude that none of the three Unions in fact had been designated by any of the replacements, nor is there evidence to the contrary. This and their apparent lack of interest for several months reasonably cast serious doubt on each union's continued majority status.[22]

The majority found that, under the circumstances, the employer had sufficient objective bases to support a

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that the Board's application of this presumption to the strike replacements in that case was both unnecessary – dictum – and unsupported by rationale or precedent.

[21] 227 NLRB 397 (1976).

[22] Id. at 397.

reasonable doubt that the *striking employees* themselves continued to support the unions. Turning its attention to the strike replacements, and without referring to *Cutten Supermarket* or *Beacon Upholstery*, the majority stated:

> [W]e would not . . . charge Respondent, in fact or in law, with a belief that [the strike replacements] desired representation by the Unions. [The presumption that new employees support a union in the same ratio as those whom they have replaced] has been held to obtain in the normal turnover situation. . . . But, in the strike situation present in this case, it would be wholly unwarranted and unrealistic to presume as a matter of law that, when hired, the replacements . . . favored representation by the Union to the same extent as the strikers [citing *Peoples Gas*, supra, and setting forth the same excerpt from that case that is set forth herein at fn. 16, supra]. The facts certainly would not support such a presumption. And since the replacements' hiring, no more has been heard from them to demonstrate any degree of union support than has been heard from the strikers. There is, therefore, at least as much justification for not indulging in a presumption that the replacements favor the Unions and for finding that Respondent had reasonable grounds for not believing that to be so, as there is for finding, as we have, that it was reasonable for Respondent to question the continued union adherence of the striking employees.[23]

[23] Id. at 397-398. In declining to apply to *strike replacements* the presumption that a majority of new employees in a normal turnover situation support the union, the majority expressly rejected the fully articulated argument in favor of such a presumption raised by then Member Jenkins in his dissenting opinion.

However, in *Windham Community Memorial Hospital,*[24] the Board set out to clarify the law on the issue of whether strike replacements may be presumed to support the union. The Board stated, "The general rule . . . is that new employees, including striker replacements, are presumed to support the union in the same ratio as those whom they have replaced."[25] The Board explained that it had declined to follow that "well-settled principle" in *Arkay Packaging,* and had held instead that the employer in *Arkay Packaging* could presume that the strike replacements did *not* support the union, because of the "unique circumstance that the union had apparently abandoned the bargaining unit." The Board in *Windham* thus held that *Arkay Packaging* represented a limited exception to the presumption that new employees, including strike replacements, support the union.

Finally, in *Pennco*, supra, the Board *rejected* the employer's contention that the presumption of new employee support for the union does not apply to strike replacements. In doing so, however, the Board stated simply:

> The Board has long held that [the presumption of strike replacement support for the union] applies as a matter of law, and it is incumbent upon Respondent

[24] 230 NLRB 1070 (1977), enfd. 577 F.2d 805 (2d Cir. 1978).

[25] Id., 230 NLRB 1070, citing *Cutten Supermarket,* supra, and *Surface Industries*, 224 NLRB 155, 163 (1976), where the judge, in an opinion adopted by the Board, relied on *Cutten Supermarket*, in applying the new employee presumption to strike replacements. However, as seen from the discussion of *Cutten Supermarket* supra, the application of the presumption of new employee support for the union to the strike replacements in that case was in dictum, and was not supported by any analysis or by apposite precedent.

> to rebut it even, and perhaps especially, in the event of a strike.[26]

The Board in *Pennco* cited no cases in support of its assertion that the presumption in question was "long held." Indeed, as the preceding discussion of cases clearly demonstrates, this presumption was not "long held" at all, but in fact was not articulated in any fashion until *Cutten Supermarket* in 1975, only 5 years prior to *Pennco*, and even then (i.e., in *Cutten*) in dictum and without supporting rationale or precedent. Nor has the Board in cases subsequent to *Cutten* involving this presumption (including, as seen, *Pennco* itself) provided any such supporting rationale. We perceive none. On the contrary, as discussed below, we perceive substantial reasons to eliminate this presumption.

Although the Board has continued to apply the presumption of strike replacement union support,[27] the circuit courts have uniformly rejected it, even when they have enforced Board orders. Thus, the Sixth Circuit in *Pennco* enforced the Board's Order but specifically declined to adopt either the Board's or the employer's suggested presumption. Rather, the court found that that given the facts of the case, the evidence was sufficient "only to put the parties in equipoise."[28] The court continued, however, finding that "equipoise is not enough for Pennco to demonstrate by objective evidence good faith doubt as to the Union's majority status. Pennco would need some further evidence of union non-support. . . ."[29] Similarly,

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[26] 250 NLRB at 717.

[27] E.g., *I T Services*, 263 NLRB 1183 (1982) (presumption applied but sufficient evidence presented to rebut it).

[28] 684 F.2d at 343.

[29] Id.

in *Windham Community Memorial Hospital v. NLRB*,[30] the Second Circuit declined to endorse the Board's presumption, and enforced the Board's Order by concluding that the employer was not, in turn, entitled to a presumption that the strike replacements did not support the union.

In cases where the courts have denied enforcement, two courts have appeared to base their decisions on the premise that strike replacements may be presumed not to support the union, thus concluding that the Board's presumption was unwarranted.[31] Most recently, the Ninth Circuit noted that the presumption has never been embraced by any court, and affirmed an administrative law judge's conclusion that under the facts of that case, it was unrealistic to presume that the strike replacements supported the union.[32]

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[30] 577 F.2d 805 (2d Cir. 1978).

[31] *National Car Rental System v. NLRB*, 594 F.2d 1203 (8th Cir. 1979); *Soule Glass & Glazing Co. v. NLRB*, 652 F.2d 1055 (1st Cir. 1981). See also *NLRB v. Randle-Eastern Ambulance Service*, 584 F.2d 720 (5th Cir. 1978).

The Chairman further notes that the Eighth Circuit's rejection of the presumption of strike replacement support for the union in *National Car Rental System v. NLRB*, supra, was couched in particularly strong terms:

> If this presumption were to be employed here, we would reach the ridiculous result of presuming that all of the ten new employees favored representation by the union even though they had crossed the union's picket lines to apply for work and to report to work each day after they were hired. This presumption of the Board is not specifically authorized by statute and is so far from reality in this particular case that it does not deserve further comment.

594 F.2d at 1206. The Chairman adds that indeed, and perhaps not coincidentally, the employer in *National Car Rental System* argued before the administrative law judge that "in order to presume that strike replacements supported the Union we must also presume that they are idiots." 237 NLRB 172, 174 (1978).

[32] *Whisper Soft Mills v. NLRB*, 754 F.2d 1381 (9th Cir. 1984).

Just as there is no articulated basis in reason or policy for a presumption that strike replacements support the union in the same ratio as the striking employees they replace, so too is there no evidentiary or empirical basis for such a presumption.

Presumptions are "fixed rule[s] of law," creating for the party against whom the presumption operates the burden of producing other evidence to rebut the presumptive fact.[33] More specifically, a rebuttable presumption of fact simply shifts to the party against whom the presumption operates the burden of producing evidence to rebut the presumption by establishing the contrary of the presumed fact.

As an evidentiary matter, presumptions should arise when it is believed that proof of one fact renders the inference of the existence of another fact so probable that it is sensible and timesaving to assume the truth of the inferred fact until it is affirmatively disproved.[34] In this light we have, as seen, carefully reviewed the Board's past decisions and assessed our experience to determine if they suggest generalizations about the views of permanent strike replacements that are so universal that they support one overall presumption that can be applied when evaluating a union's majority status. Thus incumbent unions and strikers have sometimes shown hostility toward the permanent replacements,[35] and in some instances, the union has lacked interest, at least for the duration of the strike, in

[33] 9 Wigmore, *Evidence*, § 2487 at 295-296 (Chadbourn rev. 1981); see also McCormick, *Evidence*, § 342 at 803 (2d ed. 1972).

[34] McCormick, *Evidence*, § 343 at 807 (2d ed. 1972).

[35] See, e.g., *I T Services*, 263 NLRB 1183 (1982); *Beacon Upholstery Co.*, 226 NLRB 1360); *Titan Metal Mfg. Co.*, 135 NLRB 196 (1962).

negotiating on the replacements' behalf.[36] At the same time, permanent replacements are typically aware of the union's primary concern for the striker's welfare, rather than that of the replacements. In this regard, the replacements' attitude towards union representation may be influenced by this awareness, which in turn undermines the basis for an evidentiary presumption of support for the union.[37] In light of these factors, we can find no basis for presuming that strike replacements who have accepted employment and are therefore willing to cross a picket line in order to go to work favor union representation. Accordingly, to the extent that *Pennco* relied on such a presumption, that case is overruled.

On the other hand, we find the contrary presumption equally unsupportable. Thus, the hiring of permanent replacements who cross a picket line, in itself, does not support an inference that the replacements repudiate the union as collective-bargaining representative.[38] As the court in *Pennco* noted, "the Board correctly points out that the failure to join an economic strike may not indicate a lack of support for the union, but rather may demonstrate employees' economic concerns."[39] In this regard, an employee may be forced to work for financial reasons, or may disapprove of the strike in question but still desire union representation and would support other union initiatives. The presumption of union disfavor is therefore not factually compelling. Moreover, adoption of this presumption would disrupt the balance of competing

[36] See *I T Services*, supra; *Arkay Packaging Corp.*, 227 NLRB 397 (1976).

[37] See *I T Services*, supra; *Beacon Upholstery*, supra.

[38] *NLRB v. Frick Co.*, 423 F.2d 1327 (3d Cir. 1970); *Rogers Mfg. Co. v. NLRB*, 486 F.2d 644 (6th Cir. 1973).

[39] *NLRB* v. *Pennco*, supra, 684 F.2d at 342.

economic weapons long established in strike situations and substantially impair the employees' right to strike by adding to the risk of replacement the risk of loss of the bargaining representative as soon as replacements equal in number to the strikers are willing to cross the picket line.[40]

Based on the foregoing, we can discern no overriding generalization about the views held by strike replacements and therefore we decline to maintain or create any presumptions regarding their union sentiments. Rather, we will review the facts of each case, but will require "some further evidence of union non-support"[41] before concluding that an employer's claim of good-faith doubt of the union's majority is sufficient to rebut the overall presumption of continuing majority status.

Turning now to the present case, we agree with the judge that the Respondent has not established sufficient objective considerations to support its withdrawal of recognition from the Union. The only factor presented by the Respondent is its hiring of five permanent replacements at a time when there were only three remaining strikers. This fact by itself, is insufficient to establish a good-faith doubt. Nor can we ascertain the replacements' union sentiments either from their having crossed a peaceful and sporadic picket line or from the Union's failure to contact the replacements during the strike. Rather, more evidence would be required to support a good-faith doubt, as these events, common to the hiring of

[40] *Pennco, Inc.*, 250 NLRB 717. Chairman Dotson agrees that a presumption that strike replacements oppose the union is not factually compelling, has no empirical foundations, and is thus insupportable for that reason alone. Accordingly, he finds it unnecessary to rely on the policy reason set forth in *Pennco* and invoked here by his colleagues for not adopting such a presumption.

[41] *NLRB v. Pennco*, supra 684 F.2d at 343.

replacements, do not adequately demonstrate the replacements' union sentiments. The Respondent, however, has failed to present other evidence indicating the union sentiments of the replacements.[42] Thus we cannot conclude, even absent the presumption on which the judge relied, that the Respondent has established sufficient objective considerations to support its claim of good-faith doubt.[43] Accordingly, in agreement with the judge, we find that the Respondent's withdrawal of recognition from the Union violated Section 8(a)(5) and (1) of the Act.

[42] As noted earlier, the affidavits of the five strike replacements introduced by the Respondent state only that they were not contacted by the Union since the strike began. There is no evidence concerning the replacements' union sentiments.

[43] We agree with the judge that here, unlike *Arkay Packaging Corp.*, 227 NLRB 397 (1976), there is no evidence that the Union abandoned the bargaining unit. In this regard, as found by the judge, the Union continued to "shadow" the bargaining relationship by pursuing the AFL-CIO internal jurisdictional dispute resolution procedures, organizing picketing, and attempting, in at least one instance successfully, to induce advertisers to withdraw business from the Respondent.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Buckley Broadcasting Corporation of California, d/b/a Station KKHI, San Francisco, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Dated, Washington, D.C. 27 July 1987

Donald L. Dotson, Chairman

Wilford W. Johansen, Member

Marshall B. Babson, Member

James M. Stephens, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

UNITED STATES OF AMERICA
BEFORE
THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
BRANCH OFFICE
SAN FRANCISCO, CALIFORNIA

Case 20-CA-15817

BUCKLEY BROADCASTING CORPORATION OF CALIFORNIA,
d/b/a STATION KKHI

and

NATIONAL ASSOCIATION OF BROADCAST EMPLOYEES
& TECHNICIANS, LOCAL 51, AFL-CIO

Lewis S. Harris, for the General Counsel.
Ralph M. Phillips, Los Angeles, CA, for the Charging Party.
Victor P. Reed, San Francisco, CA, for Respondent.

[Sept. 30, 1981]

DECISION

Statement of the Case

DAVID G. HEILBRUN, Administrative Law Judge: This case was heard at San Francisco, California, on August 6,

1981 based on a complaint alleging that Buckley Broadcasting Corporation of California, d/b/a Station KKHI, called Respondent, violated Section 8(a)(1) and (5) of the Act by withdrawing recognition of National Association of Broadcast Employees & Technicians, Local 51, AFL-CIO, called NABET, and thereafter failing and refusing to bargain with it as the assertedly exclusive representative of engineering and technical employees.

Upon the entire record, consideration of post-hearing briefs filed by the Charging Party and Respondent,[1] and my observation of witnesses, I make the following:

Findings of Fact and Resultant Conclusion of Law

NABET has been the exclusive bargaining representative of Respondent's engineers and technicians for many years.[2] A succession of collective bargaining agreements

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[1] General Counsel made oral argument at the close of hearing, and reiterated its general contention with a letter dated August 28, 1981 embodying one case citation and a motion to correct transcript. In the absence of response or opposition thereto, I correct the transcript at page 109, line 22, by changing "It is actual matter . . ." to "It is axiomatic. . . ." Pages 110 and 111 of the transcript subordinate to actual case citations found later in this Decision. I also note an uncorrectable ambiguity at page 110, line 12, where the reported date October 30, 1979, was actually meant to refer to a letter dated October 30, 1980 (G.C. Exh. 14).

Pursuant to Section 102.42 of the Board's Rules and Regulations, I draw on many portions of the Charging Party's post-hearing brief in composing this Decision, deeming it a pertinent, lucid, well-organized expression of "proposed findings and conclusions," as equivalent to findings of fact and conclusions of law. See *Shield-Pacific Ltd.*, 245 NLRB 409 (1979).

[2] Respondent maintains its office and place of business at the 14th floor of the St. Francis Hotel in San Francisco, California, where it is engaged in operating a radio station, as to which it subscribes to various interstate news services, advertises nationally sold products,

reflected such recognition, the last of these being effective to February 1, 1978.

Based on NABET's timely notice of reopening the parties undertook negotiations for a new agreement. These continued for many months after the February 1978 expiration date, and the NABET-represented employees continued working. On August 6, 1979 Victor Reed, Respondent's attorney, sent NABET its "best and final" offer. This led to impasse on August 22, 1979, and Respondent notified NABET that it would implement its last offer with particular respect to wage scales and a lump sum retroactive payment to each fulltime engineer.

Throughout this long course of dealings the foremost impediment to agreement was "combo" (*i.e.*, the assignment of engineering and announcing work during an on-air shift to one employee.) Historically, at least two employees had been required for an on-air shift; an announcer performing live on-air speaking duties and an engineer or technician responsible for remainder of the program (*e.g.*, play-back of music and other pre-recorded sources). The impasse was essentially rooted in "combo", but by September 1979 NABET was willing to accept the concept if NABET-represented employees were assigned to do the work. This associated to a fact that the San Francisco affiliate of the American Federation of Television and Radio Artists (AFTRA) had represented Respondent's announcers and could also represent engineers and technicians in regard to "combo" assignment. Respondent was not willing to assign "combo" work to NABET-repre-

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and annually purchases goods and materials valued in excess of $5,000 which are received at its facility directly from points outside California. On these admitted facts I find that Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and otherwise that NABET is a labor organization within the meaning of Section 2(5).

sented employees, instead wanting the work done exclusively by AFTRA-represented employees.[3]

Negotiations had resumed on September 19, 1979, but were soon clouded in controversy over whether or not an agent of Respondent had reached full agreement within the meaning of Section 8(d).[4] The parties exchanged letters in November 1979 with NABET contending that "morally and legally" an agreement was in effect, while Respondent termed this belief "ambiguous" and advised that it would effectuate some modification to what was previously unilaterally put into effect. The upshot was a strike by NABET commencing on November 12, 1979.

Soon after the Article XX proceedings concluded, Jeanne M. Bargmann, an international representative of NABET, wrote to James P. Hickey, Jr., Respondent's vice-president and general manager, as follows:[5]

> As exclusive bargaining agent of all engineering and technical employees of Radio Station KKHI, the National Association of Broadcast Employees and Technicians, AFL-CIO hereby requests that we meet to bargain with respect to the wages, hours, terms and conditions of employment of these employees.

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[3] Upon Respondent's implementation of the final offer, it began assigning AFTRA-represented employees to "combo" work. This led to proceedings by NABET against AFTRA pursuant to internal (jurisdictional) disputes resolution procedures set out in Article XX of the AFL-CIO constitution. In October 1980 the Article XX proceedings were ultimately concluded in favor of NABET.

[4] NABET filed an unfair labor practice charge on this theory in January 1980. It was dismissed and such action sustained by administrative proceedings culminating in June of 1980.

[5] On November 5, 1980 she sent a copy of the letter to Reed, apologizing for the oversight of not having done so when it was mailed out in ordinary course.

> As you are aware, the playing of records, carts and tapes by AFTRA-represented employees has been found to be a violation of Article XX, Section 3 of the AFL-CIO Constitution. In his letter to you of October 20, 1980, AFTRA Executive Secretary and Counsel Donald S. Tayer requested that you cease making such assignments to AFTRA employees. In light of these changed circumstances, please notify this office of dates as to when negotiations may commence.

Reed answered Bargmann by letter dated November 6, 1980. In part it read:

> . . . you cite to the AFL-CIO Article XX proceeding, and allege that the outcome thereof together with a letter to Mr. Hickey from Donald S. Tayer, Esquire, Executive Secretary and Counsel, AFTRA, San Francisco Local act to create a "changed circumstance" at the Station obligating the Station to enter into negotiations with NABET.
>
> We do not agree.
>
> On behalf of the Station we have advised AFTRA that we are not bound by any internal AFL-CIO proceeding because, *inter alia,* of absence of notice and opportunity to be heard, and most fundamental of all, lack of membership in the AFL-CIO which would give the Station standing. . . .
>
> As you are aware, the Collective Bargaining Agreement between KKHI and NABET, Local 51, expired by its terms on February 1, 1978, and has not been renewed despite extensive negotiations, including Mediation, which continued through September 21, 1979.
>
> Accordingly, in the premises, please be advised that by this letter, written on behalf of Buckley Broadcast-

ing Corporation, licensee of Station KKHI, the Employer hereby declares its Withdrawal of Recognition of NABET as the certified bargaining representative for engineering and technical employees of KKHI.

Lest our failure to do so be construed as an admission, please consider this letter also as categorical denial of your statement "[A]s exclusive bargaining agent for all engineering and technical employees of Radio Station KKHI. . . ."

By reason of the facts stated above, the Station considers it has no obligation to meet with NABET and declines to do so.

The general principle applicable to this case is that of rebuttable presumption attaching to a union's status as majority representative of employees in a bargaining unit where recognition has exceeded one year. The presumption may be rebutted by an employer's showing with clear, cogent and convincing evidence that it harbors a good faith reasonable doubt of such a union's continued majority support. This type of doubt will in turn justify a refusal to continue recognition where it had existed before. *Terrell Machine Company,* 173 NLRB 1480, enfd. 427 1088 (4th Cir. 1970), Cert. Den. 398 U.S. 920; *N.L.R.B.* v. *Tahoe Nugget, Inc.,* 584 F.2d 293 (9th Cir. 1978), 99 LRRM 2509.

Here the basis of Respondent's doubt is fully expressed in Reed's letter of November 6, 1980. That document touches on chronology of the long period between contract expiration and the then-current date, asserting that the employer was disinclined to have its position affected by the Article XX proceedings. This is essentially all that can be found as to why doubt over continuing majority representation of employees in the engineering and technical bargaining unit was being raised. As a matter of law it is insufficient, and for this reason alone Respondent has been shown to have unlawfully withdrawn recognition and since refused to bargain with NABET. Such a conclusion is taught by *Holiday Inn of Dayton,* 212 NLRB 553 (1974), in which the Board adopted a decision holding that when asserted doubt was based on an irrelevant consideration it could not be relied upon as valid grounds.

Notwithstanding this, the parties have litigated and argued an alternative principle dealing with the presumption of strike replacements supporting a union in the same proportion as those persons who struck. In November 1979 the unit was composed of five NABET-represented employees, all of whom joined in the strike. Picketing duty was continued in structured fashion over the November 1979—November 1980 period, with participation ranging from five at first down to two after one year had passed. Additionally, former bargaining unit members Frank Jewell and Stephen Woolard resigned their employment in February 1980 and April 1980, respectively. Over the same span NABET sought to induce advertisers away from Respondent, and this was both successful and unsuccessful in the cases of the Private Industry Council and Victoria Station (a restaurant chain) as reflected in correspondence of October 7, 1980 and October 23, 1980, respectively. In more direct relation to the presumption, Respondent introduced affidavits of the five replacement employees in which they denied having any contact from NABET during material times.[6]

In this context General Counsel argues that *Burlington Homes, Inc.,* 246 NLRB No. 165 (1979) has recently con-

[6] Two of the persons left their "radio engineer-technician" positions into which they were hired as "Permanent Replacement for striking personnel" *after* recognition was withdrawn in November 1980.

trollingly reiterated the principle of this presumption (also citing other cases), while the Charging Party adopts such authority arguing too that *Surface Industries, Inc.*, 224 NLRB 155 (1976) establishes the mere act of replacement employees crossing picket lines is not a "clear and unequivocal" sort of evidence that an employer may rely upon in claiming rebuttal of the presumption. Respondent relies most heavily on *Arkay Packaging Corporation*, 227 NLRB 397 (1976). It points to intriguing language in *Arkay*,[7] contending too that long passage of time as shown here is an objective consideration and that case authority of the opposition is distinguishable.

The Board has expressly confined *Arkay* to its own "unique circumstance" of apparent unit abandonment,[8] and clearly adheres to the presumption of proportional support by strike replacements. *Windham Community Memorial Hospital*, 230 NLRB 1070 (1977); *National Car Rental System, Inc.*, 237 NLRB 172 (1978). The denial of enforcement in *National Car Rental*,[9] including the court's criticism of *Windham*, is noteworthy but I am bound by the Board's view of this doctrine. There is no uniqueness here which would warrant application of *Arkay*, for

[7] But, in the strike situation present in this case, it would be wholly unwarranted and unrealistic to presume as a matter of law that, when hired, the replacements for the union employees who had gone on strike favored representation by the Unions to the same extent as the strikers. . . . There is, therefore, at least as much justification for not indulging in a presumption that the replacements favor the Unions and for finding that Respondent had reasonable grounds for not believing that to be so, as there is for finding, as we have, that it was reasonable for Respondent to question the continued union adherence of the striking employees. 227 NLRB at 397-8.

[8] The last sentence of what is quoted above from *Arkay* uses syntax that obfuscates its exact rationale.

[9] Reported at 594 F.2d 1203 (8th Cir. 1979).

NABET has continuously shadowed this bargaining relationship in an effort to obtain institutionally what Respondent would not concede in bargaining. This in no way weakens the thrust of *Windham* or *National Car Rental*, and I conclude that nothing Respondent has advanced in its case amounts to a rebuttal of the continuing presumption. This is particularly true where, as the Charging Party observes, nothing in even the current stated view of the three surviving replacements shows their discontent with NABET.

Accordingly, I render a conclusion of law that Respondent, by withdrawing recognition from NABET and thereafter failing and refusing to bargain with it, has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act.

Disposition

Upon the foregoing findings of fact, conclusion of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[10]

ORDER

Respondent, Buckley Broadcasting Corporation of California, d/b/a Station KKHI, its officer, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Continuing to withhold collective bargaining recognition from the National Association of Broadcast

[10] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

Employees & Technicians, Local 51, AFL-CIO (NABET) as such was withdrawn from it in November 1980.

(b) Refusing to bargain in good faith with NABET as exclusive representative of employees in the following bargaining unit:

> All engineering and technical personnel employed by Radio Station KKHI, including chief engineer, but excluding all supervisors as defined in the Act.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed by Section 7 of the Act.

2. Take the following action to effectuate policies of the Act:

(a) Upon request, bargain collectively with NABET as exclusive representative of employees in the appropriate bargaining unit described above and embody any understanding reached in a signed agreement.

(b) Post the attached notice marked "Appendix" at its San Francisco, California, place of business.[11] Copies of this notice, on forms to be provided by the Regional Director for Region 20, after being duly signed by Respondent's authorized representative, shall be conspicuously posted immediately upon receipt and be maintained for 60 consecutive days thereafter in all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that such notices are not altered, defaced, or covered by any other material.

---

[11] In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

(c) Notify the Regional Director, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

Dated: 9/30/81

/s/ David G. Heilbrun
DAVID G. HEILBRUN
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF
THE UNITED STATES GOVERNMENT

WE WILL NOT continue to withhold recognition from National Association of Broadcast Employees & Technicians, Local 51, AFL-CIO (NABET) as had been withdrawn from it by us in November 1980.

WE WILL NOT refuse to bargain in good faith with NABET as exclusive representative of employees in the following unit.

All engineering and technical personnel employed by our Radio Station KKHI, including chief engineer, but excluding all supervisors as defined in the National Labor Relations Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of rights guaranteed by the Act.

WE WILL, upon request, bargain with NABET as exclusive representative of engineering and technical employees in the appropriate unit described above, and embody any understanding reached in a signed agreement.

BUCKLEY BROADCASTING CORPORATION OF
CALIFORNIA, d/b/a STATION KKHI
(Employer)

Dated _____ By _____
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND
MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 13018 Federal Building, Box 36047, 450 Golden Gate Ave., San Francisco, CA 94102 Telephone Number: (415) 556-0335.

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(2)

Supreme Court, U.S.
FILED
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No. 88-1685

In the Supreme Court of the United States

October Term, 1988

National Labor Relations Board, *Petitioner*

v.

Curtin Matheson Scientific, Inc., *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Fifth Circuit

---

Brief for Curtin Matheson Scientific, Inc. in Opposition

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30pp

I.

QUESTION PRESENTED

Whether the Board's decision that respondent lacked a reasonably grounded good faith doubt that the Union no longer represented a majority of the respondent's employees is supported by substantial evidence in the record when considered as a whole.

II.

LIST OF AFFILIATED COMPANIES

Divisions, Subsidiaries and Parent Company of Curtin Matheson Scientific, Inc.

Divisions

J&W Scientific
Labcraft
Pacific Hemostasis

Subsidiaries

Biochemical Sciences, Inc.
Curtin Matheson Scientific (Austin) Inc. (Inactive)
United Diagnostics, Inc.

Parent Company

SciMed International, Incorporated (Parent Company: Fisons p.l.c.)

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In the Supreme Court of the United States

October Term, 1988

No. 88-1685

National Labor Relations Board, *Petitioner*

v.

Curtin Matheson Scientific, Inc., *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR CURTIN MATHESON SCIENTIFIC, INC. IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit (Pet. App. 1a-24a) is reported at 859 F.2d 362 (1988). The decision and order of the National Labor Relations Board (Pet. App. 25a-54a) is reported at 287 N.L.R.B. No. 35 (Dec. 16, 1987). The decision and order of Administrative Law Judge Martin S. Bennett is included as Pet. App. 46a-54a.

JURISDICTION

The judgment of the Fifth Circuit Court of Appeals was entered on November 4, 1988. (Pet. App. 55a) A petition for rehearing was denied on December 22, 1988. (Pet. App. 56a-57a) Pursuant to an extension of time granted by Justice White, the petition for a writ of certiorari was filed on April 17, 1989. Pursuant to the grant of another extension, the time within which to file respondent's brief in opposition to the petition for a writ of certiorari was extended to and including June 5, 1989. The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254 (1).

STATUTES INVOLVED

The relevant portions of the National Labor Relations Act, as amended, 29 U.S.C. 151 *et seq.*, are set forth at Pet. 2.

STATEMENT

On April 15, 1970, the General Drivers, Warehousemen and Helpers, Local 968, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (the "Union") was certified as the exclusive collective bargaining

representative of all production and maintenance employees of Curtin Matheson Scientific, Inc. (the "Company"). (Pet. App. 2a, 51a) During the following nine years, the Union and the Company entered into successive collective bargaining agreements, the latest of which expired on May 21, 1979. (Pet. App. 2a, 26a, 51a) On May 25, 1979, during negotiations for a new contract, the Company made its last contract offer, which was rejected by the Union on May 29, 1979. (Pet. App. 3a, 26a)

On June 4, 1979, the employer lawfully locked out all bargaining unit employees in support of its bargaining position. (Pet. App. 3a, 26a) When the parties met again on June 12, 1979, the Company renewed its last contract offer of May 25, 1979 and notified the Union that the lockout was terminated effective that date. (Pet. App. 3a, 26a-27a, 49a) The Union, however, rejected the Company's renewed contract offer, and went on strike June 13, 1979. (Pet. App. 3a, 27a, 49a) Five of the twenty-seven bargaining unit employees immediately crossed the picket line and returned to work. (Pet. App. 3a, 27a, 49a)

On June 25, 1979, while the strike was still in progress, the Company hired twenty-nine replacements, thus replacing permanently all twenty-two employees who remained on strike. (Pet. App. 3a, 29a-30a, 50a) The seven extra replacements were hired because the replacements lacked experience and some immediate turnover was expected. (Pet. App. 3a, 30a & n.9, 50a)

From the beginning of the strike, the Union suffered from a lack of enthusiasm for and interest in the strike among the employees. Indeed, the Union itself showed a surprising general apathy towards the strike and its striking members. (Pet. App. 6a-8a, 27a-30a, 49a-50a) Within a matter of weeks, it had become obvious that the Union had lost majority support among the employees. For that reason, despite the Union's notification to the Company on July 16th that it wished to accept the Company's May 25th offer, the Company on July 20th, withdrew recognition from the Union. (Pet. App. 3a, 29a, 30a, 52a) On July 20, 1979 there remained forty-nine employees in the bargaining unit, including nineteen

strikers, five cross-overs, and twenty-five replacements. (Pet. App. 3a) Of the original twenty-seven employees, a full 14.8% had voiced an intent to resign, retire, or withdraw,[1] apparently out of a desire to have nothing further to do with the Union. (Pet. App. 7a, 8a, 29a, 32a, 53a) Including the five employees who refused to participate in the strike, the total announced defections from and rejections of the Union amounted to 33% of the original workforce.

On July 20, 1979, the Union requested that the Company furnish to it the total number of bargaining unit employees currently on its payroll; the job classification of each bargaining unit employee; and the seniority date of each bargaining unit employee. Because of its good faith doubt, the Company refused to furnish this information to the Union. (Pet. App. 3a-4a, 30a-31a, 48a)

1. Striker and Union leader, Shady Goodson, resigned on July 19, 1979. (Pet. App. 53a) Another striker, Robbie Madison, resigned on July 20, 1979. (Pet. App. 53a) Striker, Raymond Brunner, tendered his notice of early retirement. (Pet. App. 53a) Clint Waller, another striker, tendered his written notice of withdrawal from the Union. (Pet. App. 53a)

In due course, the Union filed a charge with the Board alleging that the Company had engaged in unfair labor practices within the meaning of sections 8 (a) (5) and 8 (a) (1) of the Act.[2] The Board issued a complaint against the Company on September 7, 1979, and the matter was heard by Administrative Law Judge ("ALJ") Martin S. Bennett on June 10, 1980. (Pet. App. 4a, 47a)

ALJ Bennett issued his decision on November 20, 1980, determining that the Company had entertained a reasonably grounded good faith doubt as to the Union's majority when recognition was withdrawn. (Pet. App. 53a-54a) Accordingly, ALJ Bennett recommended dismissal of the complaint in its entirety. (Pet. App. 54a) The General Counsel for the Board filed exceptions and a supporting brief and the Company filed a brief opposing the General Counsel's exceptions. The record and decision were then transferred to the Board.

2. None of the Company's actions in bargaining, locking out the employees, or hiring and retaining permanent replacements for the strikers has ever been challenged or found to be improper. Only the Company's withdrawal of recognition and subsequent refusal to deal with the Union is in question.

Inexplicably, seven years passed before the Board, on December 16, 1987, finally issued its decision and order declaring that the Company had violated sections 8 (a) (5) and 8 (a) (1) of the Act. The Board ordered the Company to cease the unfair labor practices and to take certain affirmative action to effectuate the policies of the Act. (Pet. App. 26a, 40a-43a)

The Company thereafter filed its petition for review with the United States Court of Appeals for the Fifth Circuit requesting that the Board's decision and order be set aside in its entirety. The Fifth Circuit granted the Company's request, finding that the Company had lawfully withdrawn recognition due to the Company's good faith doubt concerning the Union's continuing majority support. Consequently, the Fifth Circuit reversed the Board's decision and denied enforcement of its order. (Pet. App. 1a)

The Board now seeks review of the Fifth Circuit's decision by petitioning this Court for a writ of certiorari.

For the reasons set forth in the discussion that follows, the Company opposes the petition.

REASONS WHY THE PETITION SHOULD BE DENIED

The Question Presented By The Board Will Not Be Reached By The Court.

Should the Board's Petition be granted, the Court will be faced with only one question: whether the Board's decision that the Company lacked a reasonably grounded good faith doubt of continuing majority support was supported by substantial evidence in the record. To answer this question the Court will be required to review the record in its entirety and consider *all* of the factors known to and weighed by the Company when it questioned the Union's majority support. Universal Camera Corp. v. NLRB, 340 U.S. 474, 488, 71 S.Ct. 456, 465 (1951); Bickerstaff Clay Products Co., Inc. v. NLRB, 871 F.2d 980, 984 (11th Cir. 1989). Among those factors considered by the Company, but by no means the sole factor, was the hiring of striker replacements. Despite the emphasis that has been placed by the Board upon the replacements' presumed anti-union sentiments (the "Gorman

presumption"), other objective considerations existed which, even absent reliance upon the Gorman presumption, served to create a reasonable doubt of continuing majority support. Consequently, even if the Court grants the Board's petition for a writ of certiorari, this case may be decided without ever reaching the question presented by the Board.

a. The Undisputed Legal Principles Support The Company's Contention.

It long has been recognized that following the expiration of a union's certification year, the irrebuttable presumption of continuing union majority support becomes a rebuttable presumption. *E.g.*, Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27, 37, 107 S.Ct. 2225, 2233 (1987). (Pet. App. 32a) As the Board acknowledges, following the expiration of the certification year, an employer may rebut the presumption of majority support and lawfully withdraw recognition by showing either: (1) a majority of the bargaining unit employees, in fact, no longer wish the union to represent them; or (2) the employer has a reasonably grounded good faith doubt concerning the Union's continued majority support among

bargaining unit employees. (Pet. App. 32a) Brooks v. NLRB, 348 U.S. 96, 104, 75 S.Ct. 176, 182 (1954) (approving the policy that an employer "with fair doubts about the union's continuing majority, [ ] may refuse to bargain further with it."); J. Ray McDermott & Co. v. NLRB, 571 F.2d 850, 858 (5th Cir. 1978), *cert. denied*, 439 U.S. 893, 99 S. Ct. 250 (1978); Buckley Broadcasting Corp. of California d/b/a Station KKHI & National Association of Broadcast Employees & Technicians, Local 51, 284 N.L.R.B. No. 113, slip op. at 4 (July 27, 1987), *application for enforcement pending*, No. 88-7106 (9th Cir. filed Mar. 7, 1988) (hereafter, "Station KKHI").[3]

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3. Despite the fact that the two standards are independent of one another, the Board impermissibly blurs the distinction between the two and demands that the Company be held to the first and more rigorous standard. Thus, the Board would have the Company prove conclusively for each of twenty-five members (51%) of the total workforce remaining on July 20, 1979 that each did not support the Union. (Pet. App. 32a, 34a, and 35a) With this attempt, the Board *has failed and refused to follow its own mandate* in assessing the reasonableness of an employer's withdrawal of recognition. Station KKHI, 284 N.L.R.B. No. 113, slip op. at 4 (July 27, 1987). It clearly is improper for the Board to require the Company to prove that each piece of evidence, in isolation, supports the Company's claim of good faith doubt. And it equally is impermissible for the Board to require proof that each individual comprising the majority was antiunion. Bickerstaff, 871 F.2d at 994 ("the Board has erroneously looked at each piece of evidence in isolation, instead of looking at the totality of factors presented by the Company."); (footnote continued)

b. The Company Drew Permissible Inferences From Solid Evidence.[4]

In arriving at its good faith doubt of the Union's majority status, the Company drew permissible inferences from solid evidence. Bickerstaff, 871 F.2d at 994; NLRB v. Randle-Eastern Ambulance Service, Inc., 584 F.2d 720, 729 (5th Cir. 1978). All of the factors presented by and relied upon the Company, when considered together, supported its good faith doubt. These factors included:

(1) Strike Nonparticipation. From the very beginning, the employees showed a surprising lack of interest in, and enthusiasm for, the strike. Evidence of this nonsupport included the fact that five, or 18.5%, of the unit's twenty-seven employees wholly refused to join the strike and immediately crossed the picket line and

(footnote continued) Dalewood Rehabilitation Hosp., Inc. v. NLRB, 566 F.2d 77, 79-80 (9th Cir. 1977) ("[e]ven when each factor considered alone is insufficient for a good faith doubt of majority status, the combination may be adequate."). As determined by ALJ Bennett, the Company had a "reasonably based good faith doubt of the Union's majority status [and thus satisfied the second, less rigorous test used to overcome the presumption of continuing Union majority]." (Pet. App. 53a-54a)

4. The quoted conversations and summaries of conversations contained in the discussion that follows are supported in the record.

thereafter reported to work each day. (Pet. App. 52a) While the fact that an employee who crosses a picket line and reports to work does not, in and of itself, conclusively establish repudiation of the union, a refusal to join the strike is a factor that an employer necessarily and justifiably would consider in reasonably evaluating whether it had a good faith basis for doubting the Union's majority support. Bickerstaff, 871 F.2d at 985-86, 988-89; Randle-Eastern, 584 F.2d at 728. To be sure, the Company had every reason to believe these employees rejected the union when two of the non-strikers, Tony Lopez and Bill Lee, volunteered to management their antiunion sentiments.

Mr. Lopez, on two separate occasions, initiated conversations with management for the purpose of voicing his strong dissatisfaction with the Union. He informed Company personnel that he believed the payment of union dues was a waste, and that he would not pay. (Pet. App. 7a, 27a, 49a) Bill Lee also initiated conversations with management and said "he was not paying dues to the Union and he didn't intend to, and he didn't think that

they [the Union] had done anything for the employees." (Pet. App. 7a, 27a, 49a)

The Union's Chief Shop Steward and member of the Union Negotiating Committee, Shady Goodson, also contacted Company management and volunteered that he was having difficulty manning the picket line, developing the picket roster, and getting help from the union.[5] (Pet. App. 7a, 28a, 52a, 53a) And when striker, Clint Waller, contacted management, he stated that he was not manning

5. The Board attempts to discount and undermine the significance of Mr. Goodson's statements by stressing that Mr. Goodson commenced this discussion by saying that he was acting on his own behalf. (Pet. App. at 28a n.6) But the Board misses the point. Because Mr. Goodson was actively involved in the affairs of the union as its Chief Steward and was a member of the negotiating committee, he was, in fact, an agent of the Union, and was fully aware of the attitudes of the striking employees. Consequently, his representations are entitled to significant weight in the assessment of the Company's good faith doubt of the Union's continuing majority, even if he said he was speaking on his own behalf. Randle-Eastern, 584 F.2d at 729 ("employer may rely on a Union officer's admission that the Union has lost majority support as objective evidence to support a good faith doubt."); Lodges 1746 and 743, Int'l Ass'n of Machinists v. NLRB, 416 F.2d 809, 812-13 (D.C. Cir. 1969), *cert. denied*, 396 U.S. 1058, 90 S.Ct. 751 (1970) (admission of lack of majority support which was not ever made directly to employer was important factor constituting a reasonable basis for doubt); J & J Drainage Prod. Co., 269 N.L.R.B. 1163, 1171 (1984) (statement by one of two union stewards in relatively small unit that employees were not interested in union should be accorded greater weight than comments by other employees); *see also* Bickerstaff, 871 F.2d at 987 & n.7.

the picket line, nor would he man it in the future. (Pet. App. 8a)

Striker, Raymond Brunner, complained that the strike was unnecessary and was the Union's fault. (Pet. App. 8a, 29a, 53a)

(2) Rejection Of And Disillusionment With The Union. Contributing to the Company's beliefs of waning Union support were the employees' expressions of distrust and dissatisfaction with, as well as outright rejection of, the Union. In this regard, in the volunteered disclosures made by employees Tony Lopez and Bill Lee, both stated that they did not intend to pay union dues. Lee further elaborated that he "didn't support the Union." (Pet. App. 7a, 27a, 49a)

Chief Shop Steward, Shady Goodson, reported to the Company that he "felt like they [the employees] were paying for their [Union] dues and not getting anything for it." He indicated that strikers J. R. Blackshire and Pete Doucette had expressed the same concern as he "that the Union wasn't really supporting the people." (Pet. App. 28a, 52a)

Former Shop Steward J. R. Blackshire crossed the picket line to discuss with management the lack of Union support shown by the employees and the fact that he could not support the Union because it had failed to support its members. After meeting with some of the employees who had returned to work, Mr. Blackshire again initiated a conversation with management in which he stated that the Union "had lost all their support from the employees in the unit" and that there were "many others who wanted to come back to work and didn't want the Union to represent them anymore."[6] (Pet. App. 7a-8a, 28a, 53a)

6. Again, the Board has attempted to discount the significance of the antiunion sentiments expressed by an employee. (Pet. App. 35a n.12) Rejecting Mr. Blackshire's representations that he was expressing the view of employees other than himself, the Board assigned little weight to his comments because he used the expression "the people" instead of "bargaining unit employees." Such nit picking proves that the Board applied an impermissible standard in this case. It is only *reasonable doubt* that the Company must demonstrate, not proof positive. *See supra*, n.3. Moreover, the cases the Board relied upon for the proposition that crediting such statements would mean "a few antiunion employees could provide the basis for a withdrawal of recognition when in fact there is actually an insufficient basis for doubting the Union's continued majority" (Pet. App. 35a n.12) are distinguishable from the instant case. None of those cases involved total replacement of strikers and other compelling evidence present in this record. Mr. Blackshire's involvement in the leadership of the Union had been more than that of an average employee; thus there was an additional basis for employees to express to him their Union sentiments. The Company and ALJ thus were justified in placing significant weight on his statements. *See infra* n.9.

Striker Raymond Brunner, made a written request for early retirement rather than continue to be associated with the Union. He said that he came to the decision to retire because he didn't want to work with the Union people again. (Pet. App. 8a, 29a, 53a) And Clint Waller, another striker, reiterated several times during the course of a meeting with management, his opinion that the Union was not representing the employees. Mr. Waller confirmed his dissatisfaction when he sent letters to both the Company and the Union stating "I wish not to be a member of the Teamsters no longer at Curtin Matheson Scientific, Inc. *or anywhere else.*" (Pet. App. 53a) (emphasis added)

Even striker replacement, David Schneider, volunteered to management that the Union did not support the employees. (Pet. App. 53a)

(3) Resignations, Withdrawals, And Requests For Reinstatements. The Company's doubts as to the Union's majority support was further reinforced when, prior to the Company's announcement that it had withdrawn recognition from the union, Raymond Brunner tendered his written request for early retirement, citing his

aversion to the Union as the reason for the request. (Pet. App. 8a, 29a, 53a) Moreover, after the Union notified the Company that the Union had decided to accept the offer it had rejected previously, but before the Company announced its doubts concerning the Union's continuing majority status, *two* former strikers tendered their resignations; the first was Shady Goodson, the Chief Shop Steward and Union Negotiating Committee member who previously had informed management of his and other employees' disillusionment with the Union. (Pet. App. 7a, 28a, 53a) On the day following Mr. Goodson's resignation, another former striker, Robbie Madison, tendered his resignation. (Pet. App. 30a, 53a)

During one of Mr. Blackshire's meetings with management, the former steward made a written request for reinstatement. Earlier, Mr. Blackshire had informed the Company that there were "many others [strikers] who wanted to come back to work and didn't want the Union to represent them anymore." (Pet. App. 7a-8a, 28a, 53a)

(4) Union Dormancy. Other than one piece of correspondence, which was unrelated to the strike or negotiations, the Union made no attempt to communicate

with the Company from June 12, 1979 until July 16, 1979, when the Union notified the Company of its desire to accept the contract it previously had rejected. (*See* Pet. App. 3a) Moreover, there is no evidence that, after they were employed on June 25th, the Union ever attempted to contact the striker replacements to solicit their support for the Union or the strike. There also is no evidence that the replacements attempted to contact the Union.[7] (Pet. App. 30a) Given the succession of events that transpired between June 13th and July 20, 1979, the Union's inactivity was a significant factor considered by the Company in arriving at its reasonable doubt as to the continuing majority support. Bickerstaff, 871 F.2d at 986, 992-93. The Union's inactivity was particularly significant in light of the employees' lack of enthusiasm for the strike, their vocal disenchantment with, and distrust

---

7. It was not until July 20th (almost one month after they were hired), that the Union asked the Company for information about the replacements; i.e., the number of such employees, their job classifications and seniority dates. By this time, the Company had withdrawn recognition. The belated inquiries by the Union reveal the hollowness of its "interest," if any, in the replacements and its absolute lack of information from other sources about them.

of, the Union, and the complete replacement of the strikers on June 25th. Id.

(5) Loss Of Confidence In The Union Leadership. In their meetings with Company personnel, the employees wasted no time in maligning Howard Reed, the Union's Business Agent, and accusing him of creating a strike unneeded and unsupported by the employees. For example, Tony Lopez stated that Mr. Reed was not doing his job in representing the employees and in fact called Mr. Reed a "rotten S.O.B. that is screwing the employees, taking their money, and doing nothing for us." (*See* Pet. App. 49a) The Chief Shop Steward and member of the Union Negotiating Committee, Shady Goodson, shared some of Mr. Lopez's opinions about Mr. Reed, noting that it was Mr. Reed who wanted the strike, not the employees. According to Mr. Goodson, the strike served to feed a personal vendetta on the part of Mr. Reed rather than serve the interests of the employees. (*See* Pet. App. 49a, 52a)

(6) Striker Replacements. *One* of the factors, but NOT the only factor, considered by the Company when it arrived at its belief that the Union no longer enjoyed

majority status, was the hiring of a new workforce of striker replacements. (Pet. App. 6a)

CONCLUSION

As opposed to other cases which likely will be placed before this Court for review and which contain facts more amenable to a direct and clear resolution of the question presented by the Board, the outcome of this case turns on more than just the issue of the Union sentiments of striker replacements.[8]

Indeed, the facts presented in this case are closely analogous to those addressed by the Eleventh Circuit in Bickerstaff Clay Products, Inc. v. NLRB, 871 F.2d 980 (11th Cir. 1989). In Bickerstaff, as in the instant case, the combination of a number of different factors lead to the employer's belief that the Union had lost its majority support. And while the Eleventh Circuit accepted the

8. If the Petition is granted, the Company will contend that the hiring of a new workforce is evidence upon which a good faith doubt may be grounded and that the Fifth Circuit's decision herein was proper. However, the Company will also contend that the Board impermissibly has blurred the distinction between the two standards for rebutting the presumption of continued majority support (*see supra* n.3) and has improperly trivialized and disregarded the other evidence supporting the Company's good faith doubt which was relied upon by the ALJ and the Fifth Circuit. *See supra* nn.5 & 6, & *infra* n.9.

Board's Station KKHI theory regarding striker replacements, that issue was not dispositive of the case. Rather *all* of the factors relied upon by the employer, when considered together, sustained the employer's good faith doubt. For example, in Bickerstaff, as in the instant case, a high percentage of the total collective bargaining unit refused to participate in the strike. There was evidence of Union inactivity, breakdown in Union leadership, resignations or withdrawals from the Union, employee disillusionment with the Union, and the employer's decision to hire permanent replacements. Id. at 985-88. The Eleventh Circuit weighed and considered *all* of the factors and concluded that the combined factors gave the employer a reasonably based good faith doubt of the Union's continuing majority status. Id. at 994.

Consequently, the Union sentiments of the strikers were not critical to the outcome of the case.[9]

While the Company fully appreciates the Board's interest in having the question of striker replacements' sentiments heard now, as opposed to later, this is not the case that adequately lends itself to a resolution of the Board's question. For even if the writ of certiorari is granted, *all* of the factors considered by the Company will control the outcome -- not presumptions concerning striker replacement sentiments.

The resolution of any inconsistencies that may exist among the courts of appeals as regards the questions of presumptions concerning striker replacements' union

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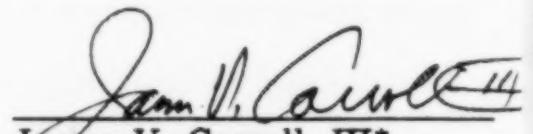
9. Likewise, the ALJ's decision herein did not rest upon a presumption concerning the antiunion sentiments of striker replacements. Rather, the ALJ assessed all of the evidence and found that it supported a good faith doubt. "[S]pecial deference must be paid to the ALJ's conclusion" where resolution of a case depends to a large degree upon assessment of the witnesses' credibility. Centre Property Management v. NLRB, 807 F.2d 1264, 1268 (5th Cir. 1987); Universal Camera, 340 U.S. at 496-497, 71 S.Ct. at 469 ("evidence may be less substantial when an impartial, experienced examiner who has observed the witnesses and lived with the case has drawn conclusions different from the Board's. . . .")

sentiments, is best left to a case in which the issue can be addressed clearly and directly.[10]

For this reason, review of this case by the Court is not warranted and the petition for a writ of certiorari should be denied.

Respectfully submitted,



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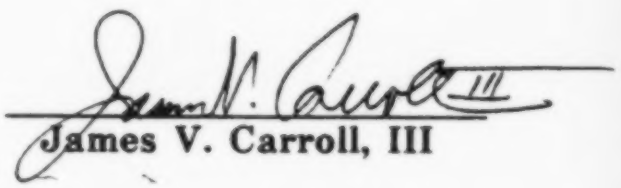
10. *See, e.g.*, Hajoca Corp. v. NLRB, 872 F.2d 1169 (3d Cir. 1989); Station KKHI, 284 N.L.R.B. No. 113, *application for enforcement pending*, No. 88-7106 (9th Cir. filed Mar. 7, 1988). The mere fact that the courts of appeals have inconsistently resolved similar issues does not make a case certworthy. *See generally, e.g.*, Brown Transp. Corp. v. Atcon, Inc., 439 U.S. 1014, 99 S.Ct. 626 (1978); Greco v. Orange Memorial Hosp. Corp., 423 U.S. 1000, 96 S.Ct. 433 (1975). And while the Company acknowledges that when assessing the reasonableness of an employer's belief that a union has lost majority support, the courts of appeals, under a variety of different scenarios, have adopted different measures to ascertain the reasonableness of the employer's doubt, the Company stresses that the Fifth Circuit's adoption of the Gorman presumption does not change the outcome of this case.

PROOF OF SERVICE

James V. Carroll, III, Andrews & Kurth, deposes and states that pursuant to Rule 28.3 of this Court he served this Brief in Opposition to Writ of Certiorari on the Petitioner by enclosing three copies of each thereof in an envelope, certified mail, return receipt requested, addressed to:

William C. Bryson
Acting Solicitor General
Department of Justice
10th & Pennsylvania Avenue, N.W.
Washington, D. C. 20530

and depositing the same in the United States mail at Houston, Texas on the *5th* day of *June, 1989*.



James V. Carroll, III

No. 88-1685

(3)

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1988

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

CURTIN MATHESON SCIENTIFIC, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONER

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In the Supreme Court of the United States

OCTOBER TERM, 1988

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONER

In our petition in this case, we explained that the court of appeals erroneously rejected the no-presumption rule adopted by the Board for evaluating the extent to which striker replacements support the incumbent union. We also noted, as had three Members of this Court in *Pennco, Inc.* v. *NLRB*, 459 U.S. 994 (1982) (White, J., dissenting), that the circuits are divided on the question whether, and to what extent, presumptions are appropriate in assessing the union sentiments of striker replacements.

On these central points, respondent takes no issue with us. It acknowledges that "the courts of appeals have inconsistently resolved similar issues," adopting "different measures to ascertain the reasonableness of the employer's

doubt" of a union's majority status (Br. in Opp. 23 n.10). And respondent does not dispute the evident reasonableness of the no-presumption rule, as articulated by the Board in *Buckley Broadcasting Corp. of California d/b/a Station KKHI & National Association of Broadcast Employees & Technicians, Local 51 (Station KKHI)*, 284 N.L.R.B. No. 113 (July 27, 1987), application for enforcement pending, No. 88-7106 (9th Cir. filed Mar. 7, 1988), and as applied by the Board in this case.

Respondent opposes the petition in this case for the sole reason that, in its view, the case is an inappropriate vehicle for resolving the question presented. Citing a litany of factual matters (Br. in Opp. 11-20), respondent contends that it had a sufficient basis for doubting the majority status of the union—wholly apart from whether, pursuant to the "Gorman presumption," the striker replacements must be presumed to oppose the incumbent union. But the court of appeals—whose judgment is at issue in this case—did not rely on any of the factors urged by respondent. Rather, the court below denied enforcement because, as the court put it, "[w]here such a substantial percentage of the bargaining unit employees is replaced on the same day, and the striker replacements cross a picket line, violent or not, to report each day, the Company is justified in counting the striker replacements as employees whom they doubt support the Union" (Pet. App. 10a).

The case, in short, was decided entirely on the strength of the Gorman presumption. As Judge Williams noted in dissent, "[t]he outcome of this case turns on the significance attached to the hiring of permanent replacement workers during an economic strike" (Pet. App. 12a). Thus, while the factual matters raised by respondent may be relevant to a disposition by the court of appeals on remand from this Court, they do not constitute a basis for opposing further review of the question presented.

Finally, we note that two court of appeals decisions issued since our petition was filed have intensified still further the conflict among the circuits. In *Hajoca Corp.* v. *NLRB*, No. 88-3707 (Apr. 26, 1989), the Third Circuit, noting the inter-circuit conflict (see slip op. 9-10), approved the Board's no-presumption rule on the ground that it made "eminent good sense" and could not "be deemed irrational or inconsistent with the Act" (*id.* at 11). In doing so, that court expressly rejected the approach of the Fifth Circuit in the present case. The Third Circuit explained that the Fifth Circuit's standard "directly conflicts with the employer's burden of showing its good faith doubt by objective evidence," ignores the fact that replacements "may cross picket lines * * * not out of opposition to unions but due to economic necessities," and "simply lacks empirical support" (*id.* at 10).

Similarly, in *Bickerstaff Clay Products Co.* v. *NLRB*, 871 F.2d 980 (1989), the Eleventh Circuit, also noting the conflict among the circuits (see *id.* at 989-991), approved the Board's requirement that an employer show " 'some further evidence of union non-support' in order to count replacements as employees whom the company doubts support the Union" (*id.* at 991-992). Although, on the facts of the case, the court refused to enforce the Board's order, the court rejected the Gorman presumption (*id.* at 991) and criticized the reasoning adopted by the Fifth Circuit in the present case (see *ibid.*).*

---

* Since the filing of the petition, the Second Circuit has reaffirmed its approval of the no-presumption rule, explaining that it "has never been comfortable either with the presumption that replacement workers support the union or with the presumption that they oppose it." *Proxy Communications of Manhattan, Inc.* v. *NLRB*, No. 88-4140 (Apr. 14, 1989), slip op. 2735 n.2.

For the foregoing reasons and those stated in our petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

KENNETH W. STARR
Solicitor General

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National Labor Relations Board

JUNE 1989

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED APRIL 17, 1989
CERTIORARI GRANTED JUNE 26, 1989

EDITOR'S NOTE:

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In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 88-1685

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

CURTIN MATHESON SCIENTIFIC, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Board Case No. 23-CA-7620

IN THE MATTER OF: CURTIN MATHESON SCIENTIFIC, INC.

Date	*Documents*
07.30.79	Charge
09.07.79	Complaint
09.18.79	Answer to Complaint
11.27.79	General Counsel's Motion to Transfer Case and to Continue Proceeding Before the Board and for Summary Judgment
12.04.79	Board's Order Transferring Proceeding to the Board and Notice to Show Cause
12.18.79	Respondent's Opposition to General Counsel's Motion for Summary Judgment and Cross-Motion for Summary Judgment
03.12.80	Board's Order Denying Motions
03.19.80	Notice of Hearing
06.10.80	Hearing
11.20.80	Administrative Law Judge's Decision
12.24.80	General Counsel's Exceptions
01.09.81	Respondent's Opposition to General Counsel's Exceptions
12.17.87	Decision and Order
01.11.88	Petition for Review
01.29.88	Cross-Application for Enforcement

Date	*Documents*
02.01.88	General Drivers Local 968's Motion to Intervene Granted
11.04.88	Decision of the Court of Appeals
11.04.88	Judgment of the Court of Appeals
12.22.88	Board's Suggestion for Rehearing En Banc Denied
04.17.89	Petition for writ of certiorari filed
06.26.89	Petition for writ of certiorari granted

BEFORE THE
NATIONAL LABOR RELATIONS BOARD
TWENTY-THIRD REGION

Case No. 23-CA-7620

IN THE MATTER OF:
CURTIN MATHESON SCIENTIFIC, INCORPORATED,
RESPONDENT,

and

GENERAL DRIVERS, WAREHOUSEMEN & HELPERS,
LOCAL 968, AFFILIATED WITH INTERNATIONAL
BROTHERHOOD OF TEAMSTERS, CHAUFFEURS,
WAREHOUSEMEN & HELPERS OF AMERICA,
CHARGING PARTY.

Courtroom No. 1
One Allen Center
Suite 910
500 Dallas Avenue
Houston, Texas

Tuesday, June 10, 1980

The above-entitled matter came on for hearing, pursuant to notice, at 10:00 a.m.

Before: HON. MARTIN S. BENNETT,
Administrative Law Judge

[2] APPEARANCES:

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On behalf of the Charging Party:

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Also present to assist the General Counsel:

ERNEST DURAN

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* * * *

[8] ELIZABETH PRICE

having been first duly sworn, was called as a witness herein and was examined and testified as follows:

JUDGE BENNETT: State your name and address for the record.

THE WITNESS: Elizabeth Price, 11582 South Kirkwood, Stafford, Texas.

[9] **DIRECT EXAMINATION**

BY MR. MIDDLETON:

Q. Ms. Price, where are you employed?

A. I am with Curtin Matheson Scientific.

Q. What position do you hold there?

A. Director of Employee Relations.

Q. And how long have you held that position?

A. Almost four years.

Q. Therefore, you were holding that same position as of May of 1979?

A. Yes.

Q. Are you the same Ms. Price that furnished an affidavit dated December 14, made an affidavit—correction—dated December 14, 1979 that was attached to the Respondent's Motion for Summary Judgment?

A. Yes, I am.

Q. You are familiar with the underlying dispute, then, from its inception, are you not?

A. Yes.

JUDGE BENNETT: Somewhere in the pleadings, if I recall, the date of 1970 appears, and I think the parties are in agreement it is 1979?

MR. MIDDLETON: There was one place, in fact an inadvertent typographical error, in the General Counsel's Motion for Summary Judgment at one point where the date of [10] certification was referred to as April 15, 1979, but it should have been April 15, 1970.

JUDGE BENNETT: All right.

MR. MIDDLETON: And a copy of that certification is attached to the General Counsel's Motion for Summary Judgment.

I will give it to you exact.

JUDGE BENNETT: Is that agreeable?

MR. MORSE: That is correct, Your Honor, as far as we are concerned.

JUDGE BENNETT: All right.

MR. MIDDLETON: It's attached, a copy of the certification is attached, to the General Counsel's Motion for Summary Judgment as Appendix F, Your Honor.

JUDGE BENNETT: All right.

BY MR. MIDDLETON.

Q. Ms. Price, when did you first conclude that the Union no longer represented a majority of the unit employees?

A. It was after we had had a few conversations with the striking employees.

Q. Could you give us a date?

A. I guess the first one would be June 27th.

Q. Now, is this the date that you actually concluded that they no longer represented a majority of the employees?

A. That would really not be the date we concluded that.

[11] It would be the date of the first conversation we had with the employees, and it would be probably two or three days later that we were fairly sure.

Q. When you say "we," who are you referring to?

A. I guess myself.

JUDGE BENNETT: How many employees did you have, roughly?

THE WITNESS: We had 27 that went out on strike.

JUDGE BENNETT: How many did you have in all?

THE WITNESS: Twenty-seven.

JUDGE BENNETT: So, and correct me if I am in error, all of your employees went out on strike?

THE WITNESS: Yes, sir, although five of them crossed the picket line.

BY MR. MIDDLETON:

Q. The unit that was certified by the National Labor Relations Board through the certification of representation issued on April 15, 1970, is the same unit that was included in your last collective bargaining agreement that was executed; is that true?

A. I don't think I have ever seen the 1970 document, so . . .

MR. MIDDLETON: Counsel, would you be willing to stipulate that the unit certified by the Board is the same unit that was represented by the Union under the collective bargaining agreement that last expired?

[12] MR. MORSE: I think we will.

JUDGE BENNETT: So stipulated.

BY MR. MIDDLETON:

Q. Now, you mentioned that you had had some conversations with some of the employees regarding the Union; is that correct?

A. Yes.

Q. And it was as a result of those conversations that you concluded that the Union no longer represented a majority of the unit employees?

A. Correct.

Q. In your affidavit of December 14, 1979, you set forth fully and accurately the basis for that conclusion, do you not?

A. Yes.

Q. And of the employees that you spoke to or mentioned in that affidavit?

A. Each of the employees that we had conversations with?

Q. Yes, that led to your conclusion?

A. I think –

Q. That the Union no longer represented a majority of the employees?

A. I think there are two people that are not mentioned by name in that affidavit.

Q. Could you tell us who they are?

[13] A. Their names are Tony Lopez and Bill Lee.

Q. What was the last name?

A. Bill Lee, L-e-e.

JUDGE BENNETT: Which exhibit is that affidavit?

MR. MIDDLETON: It's attached to the Respondent's Motion for Summary Judgment. Well, it's really – It's entitled, "Affidavit in Opposition to General Counsel's Motion for Summary Judgement and in Support of the Company's Motion for Summary Judgement."

It would be 1(h), Your Honor.

JUDGE BENNETT: It's attached to 1(h)?

MR. MIDDLETON: Correct.

BY MR. MIDDLETON:

Q. Now, from what I can surmise from the affidavit there were, apparently, five employees that you spoke to, namely, who would be Shady Goodson, J. R. Blackshire, Clint Waller, Tony Lopez and Bill Lee.

A. There was also a conversation with a Raymond Brunner.

Q. Would you spell Mr. Brunner's last name?

A. B-r-u-n-n-e-r.

JUDGE BENNETT: Who is he?

THE WITNESS: He was one of the striking employees.

BY MR. MIDDLETON:

Q. Is he referred to in your affidavit of December 14?

A. I, frankly, can't remember.

[14] JUDGE BENNETT: Would you like to see your affidavit?

THE WITNESS: Yes.

JUDGE BENNETT: I am showing her what, I think, is her affidavit.

THE WITNESS: He is not referred to by name, but under (e) . . .

BY MR. MIDDLETON:

Q. How many persons . . .

MR. MIDDLETON: Well, withdraw that.

BY MR. MIDDLETON:

Q. Who are the persons, by name, that you are referring to under Part (e) of that affidavit?

A. Tony Lopez, Bill Lee and Raymond Brunner.

Q. Are you still looking at your affidavit?

A. Yes.

Q. Will you take another look at it, please?

In Part (i) you state that one striker had retired.

Can you tell us who that striker is?

A. That's Raymond Brunner. I am sorry. I didn't realize we had that.

Q. And in Part (h) you state that five of the 26 old employees were crossing the picket lines to come to work.

Would you give us the name of those employees?

A. Yes. Gilbert Ozuni

Q. Would you spell them for us?

[15] A. Yes. O-z-u-n-i-g-a. Sandra Hutto, H-u-t-t-o. Alvin Harper, H-a-r-p-e-r.

Q. What was the first name?

A. Alvin. Bill Lee and Tony Lopez.

JUDGE BENNETT: You have named five people?

THE WITNESS: Yes, sir.

BY MR. MIDDLETON:

Q. You also stated in your affidavit at Part (f) that Clint Waller resigned from the Union and told you that he did not ever want to have anything to do with the Union again?

A. Yes.

Q. When did Clint Waller make that statement to you?

A. The first time we talked with Clint was sometime around the beginning of July, and at that point he expressed his dissatisfaction. Later on, he did write the Union and sent us a copy of that letter.

Q. Can you tell us where that conversation took place and who was present?

A. Okay. It was in our Operations Manager's office with Jim Crocker, who is the Operations Manager and myself.

Q. How did Mr. Waller come to be in the Operations Manager's office at that time?

A. He had called on a number of occasions and asked if he couldn't talk with us.

[16] Q. And it was as a result of some earlier calls that he was in the office at that time?

A. Yes.

Q. Who were those calls made to, to your knowledge?

A. Jim Crocker.

Q. And do you know what the dates of those calls were?

A. No. I don't have a record of it. I do know it was sometime in the early part of July.

Q. When the first such call was made?

A. Yes.

Q. When did you first become aware of those calls?

A. Jim let me know, I would say, within a day or two of the calls.

Q. Do you remember when that was?

A. Along the same time.

Q. The first week of July, 1979?

A. Right.

Q. Was the strike in progress at that time?

A. Yes, it was.

Q. And was Mr. Waller working at that point? He is not one of those that crossed the picket line?

A. No, he isn't.

Q. Would you tell us what was said during that conversation, using the words that each of the persons who spoke used, so far as you presently recall?

[17] A. Okay. Clint did most of the talking.

JUDGE BENNETT: Clint who?

THE WITNESS: Clint Waller did most of the talking.

BY MR. MIDDLETON:

Q. Pardon me for interrupting you.

Before we go into that, first of all, would you please tell me how you came to be – Was there an appointment set up specifically with Clint Waller to talk to him at that time?

A. Not a specific date. We told him if he wanted to talk with us he could come in and talk with us.

Q. When you say "we," who are you referring to?

A. Jim Crocker and I.

Q. Did you also speak with him and tell him that he could come in to speak with you?

A. No. Jim was the only one talking to him on the phone.

JUDGE BENNETT: Jim who?

THE WITNESS: Jim Crocker.

JUDGE BENNETT: Jim telephoned him?

THE WITNESS: No. No. He called us.

BY MR. MIDDLETON:

Q. Can you tell us how many times he called you between the dates of the first call and the dates of the meeting?

A. I can't offhand, no.

JUDGE BENNETT: Do you have any rough idea?

A. I would say two.

[18] BY MR. MIDDLETON:

Q. And how did you know that he would be in Clint's office – pardon me – in Mr. Crocker's office at the time you were present there?

A. Well, he asked for Jim Crocker at the reception desk, and Jim on his way up to the reception desk talked with me and we both went back to Jim Crocker's office and had a conversation.

JUDGE BENNETT: So, then, there was three of you present?

THE WITNESS: Yes, sir.

BY MR. MIDDLETON:

Q. Do you remember what time of the day this conversation or business took place?

A. No, I don't.

Q. Do you know whether it was in the morning or afternoon?

You will have to give us a verbal answer.

A. I can't remember.

JUDGE BENNETT: How long did the meeting last?

THE WITNESS: It was probably about 20 minutes.

BY MR. MIDDLETON:

Q. Now, would you tell us—First of all, was he in the office when you arrived? Was he in Mr. Crocker's office when you arrived in Mr. Crocker's office that time?

[19] A. I can't remember.

JUDGE BENNETT: In any event, you were there for 20 minutes with him?

THE WITNESS: Yes.

JUDGE BENNETT: And Mr. Crocker?

THE WITNESS: Yes. Our normal procedure is for the individual to be escorted in the office. I would have already been in there.

I can't honestly tell you if that is exactly the way it happened that day or not.

BY MR. MIDDLETON:

Q. Do you recall when you entered the office who was present?

A. No. I know that the conversation was with Jim Crocker, Clint Waller and myself. I can't remember if I walked in and they were there or Clint walked and Jim and I were already there.

Q. Could you tell us, as best you recall, what was said from the beginning of the conversation until it ended, using the words that each person used?

A. As best I can recall, yes.

Clint came in to talk with us because he was very upset about the strike and the way that the Union was representing the employees.

Q. Well, you are summarizing now. I would like for you to [20] just to tell us what was said, not to summarize.

JUDGE BENNETT: Try to use his words as well as you recall. I realize you can't quote him word for word, but give us the best of your recollection.

THE WITNESS: Okay. "I wanted to come in and talk with you today, because I am upset with the Union. I haven't been working the picket line. I don't intend to work the picket line. I don't think the Union is representing us. I would really like this thing to get over with, and I wanted you to know that.

"In addition to that, I have decided to withdraw my membership from the Union and want to know how that affects my unemployment benefits."

At that point I would have told him that we didn't know about his unemployment benefits and whether or not—

BY MR. MIDDLETON:

Q. You say you would have told him? I want to know what you said exactly so far as you presently recall?

A. Okay. I did tell him. I can't remember the sequence of the entire conversation. I did tell him at one point that I had no idea how it would affect his unemployment benefits, because I didn't, and whether or not he resigned from the Union I did not know what effect that would have.

That was totally between him and the Union.

Q. Anything else?

[21] A. I just know that he kept expressing his dissatisfaction with the way in which the Union was handling the situation.

Q. But you have told us what you remembered him saying at that time.

Is there anything else that he said that you presently recall?

A. Other than to reiterate his ideas, no, I can't at this point.

Q. Did Mr. Crocker make any statements during that time?

A. I know he did, but—

Q. Can you tell us what you recall him saying?

A. They would be along the same lines as mine.

Q. You don't recall, then, what Mr. Crocker said to Mr. Waller at that time?

JUDGE BENNETT: I believe she said—

A. Verbatim. I don't know. I am sorry.

JUDGE BENNETT: I believe she said in essence he said the same thing she did.

BY MR. MIDDLETON:

Q. But as to the actual words used by Mr. Crocker you don't recall; is that right?

A. No, I don't.

Q. Do you recall any other statements made by Mr. Waller at that time?

A. I am trying to remember.

[22] JUDGE BENNETT: Is your answer that you don't recall?

THE WITNESS: I don't recall.

BY MR. MIDDLETON:

A. No, I did not.

Q. Did you later make any notes, in other words, after the meeting was over, did you make any notes as to what was said?

A. No, I did not.

Q. Did you do that with reference to any of the discussions you had with the employees about their interests or disinterest in the Union?

A. Yes, I did.

Q. Which employees were those involved in those cases where you made such notes?

A. I have notes of a discussion with J. R. Blackshire, Raymond Brunner, Pete Doucette. That's D-o-u-c-e-t-t-e.

Q. Pete Doucette?

A. Yes.

Q. He is not one of the names you gave us earlier, is he?

A. No, he isn't, but I have notes of a conversation I had with him, and Shady Goodson.

JUDGE BENNETT: You have named four people?

THE WITNESS: Yes.

[23] BY MR. MIDDLETON:

Q. Doucette, Brunner, Goodson and Blackshire?

A. Yes, sir.

Q. Did either of those persons sign any statements confirming what they told you?

A. No.

JUDGE BENNETT: You made notes when you spoke with them or afterwards or what?

THE WITNESS: I did not make notes as I spoke with them, but it would have been immediately afterwards.

BY MR. MIDDLETON:

Q. What did you do with those notes?

A. I kept them.

Q. Do you have them with you today?

A. We do.

Q. Would you be so kind as to present those?

MR. MIDDLETON: Well, I will withdraw that at this time.

BY MR. MIDDLETON:

Q. In the conversation that you had with Mr. Waller, which I gather from what you have told us was the first such conversation you had with him the employees regarding their disinterest in the Union?

MR. MORSE: Objection.

A. No.

[24] MR. MORSE: I object, Your Honor. That's misstating the evidence.

JUDGE BENNETT: Overruled.

BY MR. MIDDLETON:

Q. Am I incorrect?

A. That is not the first conversation I had with the employees.

Q. Regarding their disinterest in the Union?

A. Correct.

Q. What was the first conversation you had? Who was it with?

A. The very first conversation would have been with Tony Lopez.

Q. When did that conversation occur?

A. It was probably the first two weeks in June.

Q. Who was the next person you had such conversation with?

A. Bill Lee.

Q. When did it occur?

A. About the same time period.

Q. The same time period as with—

A. Tony Lopez.

Q. —Tony Lopez?

A. Yes.

Q. Okay. And who was the next person?

A. J. R. Blackshire. No. Excuse me. It would have been [25] with Shady Goodson.

Q. When did your conversation with Shady Goodson occur?

A. June 19th.

Q. Mr. Goodson was one of the shop stewards there; is that correct?

A. He was a chief steward, yes.

Q. Mr. Blackshire was the other steward?

A. No. J. R. Blackshire had been a steward before, but he wasn't right then.

Pete Doucette was a steward.

Q. Pete Doucette. Pete Doucette was a steward at the time you had the conversation with him; is that your testimony?

A. Yes.

Q. And Blackshire was a former steward, as you stated in your affidavit; is that correct?

A. Right.

Q. For what period of time did Blackshire serve as a steward?

A. I can't tell you offhand.

Q. Was it during the time—Can you give us just an approximate time frame in connection with the statement or discussion you had with him? Was it a year, six months before or how long?

A. I would say it was at least prior to a year before, but I am not really sure.

[26] JUDGE BENNETT: We will take a five-minute recess.

MR. MIDDLETON: All right.

(Whereupon, a short recess was taken.)

JUDGE BENNETT: On the record.

MR. MIDDLETON: Your Honor, at this time, General Counsel would like to object on the record to the witness having immediately engaged in discussion with Counsel over the objections of the General Counsel while the Court was in recess.

JUDGE BENNETT: Do you mean during the recess while I was out of the room?

MR. MIDDLETON: Yes.

MR. MORSE: Your Honor, I advised the witness simply to relax and to listen to the question, whereupon General Counsel jumped on me and started threatening me and my client about how to conduct ourselves.

I hope I was not out of line in doing that.

JUDGE BENNETT: I see nothing wrong with the witness talking with her or his counsel, with the exception, and that apparently is not the case here, that Counsel will tell a witness what to say or what not to say.

Do you quarrel with Counsel for Respondent as to what he allegedly said?

MR. MIDDLETON: Well, Judge, if you are merely telling the witness to relax, I don't think it would have been a [27] whisper during the discussion.

JUDGE BENNETT: You are saying he whispered?

MR. MIDDLETON: Yes, sir, that's true.

JUDGE BENNETT: Then you don't know what he said?

MR. MIDDLETON: That's true. I presume that it was something that –

MR. HORTON: Your Honor, I heard the witness and –

MR. MORSE: Wait a second.

JUDGE BENNETT: Wait a minute. I will overrule the objection. Next question.

BY MR. MIDDLETON:

Q. Ms. Price, you mentioned Sandra Hutton. When was Sandra Hutton hired?

A. It's Hutto.

Q. Hutto. I am sorry.

A. I could only estimate that it was something like two or three months prior to the lockout.

Q. Was she on check-off at the time the lockout occurred?

A. She did not pay dues.

JUDGE BENNETT: You used the phrase "lockout."

What does that mean to you?

THE WITNESS: We locked the employees out.

MR. MIDDLETON: I think we can get a stip – well, I will ask Counsel.

Are you willing to stipulate that the employer locked [28] out the employees on or about June 4th, 1979?

MR. MORSE: Your Honor, we will stipulate to that, if the General Counsel in turn will stipulate the legality of the lockout is not an issue in the lawsuit.

MR. MIDDLETON: I will, Your Honor.

JUDGE BENNETT: All right. So stipulated.

We have a strike in the situation.

MR. MIDDLETON: That's true.

JUDGE BENNETT: Can we agree on the date of the strike?

MR. MIDDLETON: Yes, sir. The strike occurred – I would propose to stipulate that the strike commenced on June 13 and terminated on July 15th, 1979.

MR. MORSE: Your Honor, for the purpose of arranging the stipulation, can we go off the record for a moment?

JUDGE BENNETT: Off the record.

(Discussion off the record.)

JUDGE BENNETT: On the record.

Do you have a stipulation?

MR. MIDDLETON: Your Honor, we will stipulate that the strike commenced on June 13.

JUDGE BENNETT: June 13, 1979?

MR. MIDDLETON: '79, that's correct.

MR. MORSE: We join in that stipulation, Your Honor.

JUDGE BENNETT: All right.

[29] BY MR. MIDDLETON:

Q. Isn't it also true, Ms. Price, that Alvin Harper and Tony Lopez were not on dues check-off status?

A. That's true.
Q. They had never been since they were hired?
A. Correct.
Q. Weren't they also hired immediately prior to the lockout?
A. I am not sure when they were hired. I thought Tony had been there like six months and Alvin, I am not sure of.
Q. You are not sure about Alvin?
Do you have any estimation as to how long he had been there before the lockout?
A. No, I do not.
Q. Now, directing your attention back to the discussion you had with Mr. Waller, have you told the Court all that you recall about that conversation?
A. That's all I can recall right now, yes.
Q. Of course, I am referring to where you and Mr. Crocker were present.
A. Yes, sir.
Q. Do you have any better recollection as to the date of that conversation?
A. No, I do not.
Q. Now, would you tell us where the conversation with [30] Tony Lopez and you occurred?
A. Yes. It was in the receiving area of the warehouse.
Q. Of the warehouse, and who was present at that time?
A. There were a number of conversations. It was usually just Tony and I.
Q. Just the two of you in the receiving area of the warehouse?
A. Right.
Q. And do you recall what time of the day this conversation occurred?
A. Well, there were, like I say, a number of conversations, and it would have been at any time during the day, because I was working in the receiving department.

Q. Was he also working in the receiving department?
A. Yes, he was.
Q. What was his job classification?
A. He is a warehouse worker.
Q. And you have told us you had a number of conversations with him in that working situation?
A. Right.
Q. I just want to focus your attention on the one where he expressed his displeasure with the Union to you.
Did you have more than one such conversation with him or was there just one such conversation?
A. There was more than one.
[31] Q. How many were there as you expressly recall?
A. I can't tell you exactly, because we worked together everyday but there were at least two.
JUDGE BENNETT: Did he initiate the conversations?
THE WITNESS: Yes, sir.
BY MR. MIDDLETON:
Q. Well, you said you recall two.
Would you tell us which of those was first?
A. Okay. There was one where the two of us were checking in some items off the trucks, and he started expressing his views about the Union.
Q. Let me interrupt you for just a second.
This would have been during the first week of June?
A. The first or second week.
Q. The first or second week. Okay. Sometime during that first two-week period?
A. Right.
Q. Continue, please.
A. Okay. He said that he thought the Union had done nothing for those employees. He was not paying Union dues because he would not support the Union in any way.
He had, from the time he was hired been asked—his word was harassed by the other employees to pay the Union dues and he refused.

In addition to that he thought that the business [32] representative was not doing his job to represent the people as he should have.

Q. I think what I am hearing is a summary.

Would you just try and use the words that he used as you presently recall?

A. Okay. I will repeat all of it.

JUDGE BENNETT: I think in essence she has done that.

THE WITNESS: If you say where I said that he said, just say I, and that would express it.

Q. In other words, if there was some comment by you in between some of those remarks, I would like that, too.

In other words, if he said, "I don't like the way the Union representative is doing his job," if you made a response to that I would like to hear what your response was.

A. Okay. I never responded. I listened. I had no response to what he was saying.

Q. During either of the conversations?

A. During any of those conversations.

Q. Okay. If you would go ahead, then, and finish telling us what you proceeded to do, I would appreciate it.

A. Okay. I think in my conversation that's about all he said.

Q. Approximately when, in connection with that conversation, did the next one occur?

[33] I realize you don't have the dates, but the number of days?

A. It was a couple of days later, and I remember it because we were taking a break looking out the receiving door and the business representative, Howard Reed, drove up, and that is when he started the other conversation.

Q. All right. Would you tell us again what you presently recall being said during that conversation by Mr. Lopez?

A. He—Do you want the exact words?

Q. As best you presently recall.

A. Well, he used a lot of profanity.

Q. Well, I realize that that may be something you are not accustomed to, but if you have no reservations about it the Court is accustomed to that, and so are we.

A. Okay.

JUDGE BENNETT: I have heard my share of it before.

THE WITNESS: Oh, I have, too. I just feel funny saying it.

JUDGE BENNETT: Just use the language.

THE WITNESS: Okay. He saw Howard Reed drive up and he said, "There is that rotten S.O.B. that is screwing the employees, taking their money, and doing nothing for us," or the people who are paying the dues.

BY MR. MIDDLETON:

Q. Did he say anything else?

[34] A. He again reiterated that he wasn't going to pay dues to that Union and he really thought it was a waste paying them?

JUDGE BENNETT: A what?

THE WITNESS: A waste.

BY MR. MIDDLETON:

Q. Is that all you recall from that conversation?

A. Yes.

Q. Now, who was the next person—Well, I believe you testified earlier that Bill Lee and you had similar discussions during that same period of time?

A. That's right.

Q. Was there one or more than one such conversation with Bill Lee?

A. With Bill, I only remember one time him talking with me.

Q. Where did that conversation take place?

A. That was back at the shipping docks.

Q. And was that his regular work area?

A. Yes.

Q. Did he initiate that conversation or did you initiate it?

A. He initiated it.

Q. How was it that you were in that area at the time?

A. I was delivering goods from receiving or back there [35] checking freight bills, something of that nature.

Q. Just for the record, you mentioned earlier that you were working in the receiving area?

A. Yes.

Q. Was that a regular activity on your part as a part of some job duty that you had?

A. No.

Q. How did you happen to be in the receiving area during those times you had the conversations with Tony Lopez?

A. During the lockout Management worked the warehouse, and I usually worked in receiving.

Q. Okay. So, it was during the time that you were helping to carry on the activities while the lockout was in effect?

A. Yes, and even after the strike a few of us worked to help the new employees.

Q. Now, would you proceed to tell us about the conversation you had with Bill Lee?

A. Yes. Bill expressed—He said that he was not paying dues to the Union and he didn't intend to, and he didn't because he didn't support the Union and really didn't think that they had done anything for the employees.

Q. Is that the extent of that conversation as you presently recall?

A. Yes.

Q. Now, Raymond Brunner; when did you have a conversation [36] with Mr. Brunner?

A. On July 12th, and that was the day he came in to retire.

Q. Where did that one take place, that conversation?

A. I don't have in my notes where it was. I think it was in Tim Martin's office. It was in an office. I am assuming it was Tim Martin's or Pete Hacker's.

Q. Who was present during that conversation?

A. Tim Martin and myself.

Q. What is Mr. Martin's position?

A. He was at that time Area Manager for the Southwest.

JUDGE BENNETT: Was anyone else present?

THE WITNESS: No, sir.

BY MR. MIDDLETON:

Q. Would you tell us, as best you recall, what was said during--First of all, were you present during that entire visit by Mr. Brunner?

A. Yes.

Q. Would you tell us what was said from the beginning to the end of the visit by Mr. Brunner and by Mr. Martin and yourself?

A. Raymond said that he had been thinking about retiring ever since the lockout occurred. He had talked it over with his wife. His wife was working, and he decided to do so.

His reason for retiring was he didn't want anything to [37] do with the Union again. He made that statement two or three times, that he just didn't want to have to work with the Union anymore.

Q. And was there anything else that he said during that conversation that you recall?

A. He expressed his feelings about the Company and leaving the Company at that point, and how he really

didn't want to leave and it was a rough decision, but he had decided to do so.

Q. Was that the extent of the conversation as you presently recall?

A. Yes, I think so.

Q. How long did it last?

A. Oh, I think it was like ten minutes.

Q. Did Mr. Martin or yourself make any comments or statements during that visit?

A. Yes. We—

Q. Will you tell us separately? In other words, identify what your statements were as opposed to Mr. Martin's, tell us what each of you said?

A. Okay. Tim expressed a couple of times that he hated to see Raymond leave. He had been with the Company a long time and he just hated to see him leave.

I just, more or less, repeated the same thing, and other than that, expressing those ideas, we didn't say [38] anything.

Q. Would you tell me again who those persons were where you made the notes? I know Mr. Brunner was one.

A. Yes. J. R. Blackshire, Shady Goodson and Pete Doucette.

Q. How do you spell Mr. Doucette's last name?

A. D-o-u-c-e-t-t-e.

Q. Four persons; is that correct?

A. Yes.

Q. Now, who was the next person after you had the discussion with Mr. Brunner that you had such discussion?

A. Well, there were discussions before Mr. Brunner.

Q. Pardon me. Who would have been after Mr. Lee? If I understood your testimony, up until this time, Tony Lopez and Bill Lee were one after the other, in other words?

A. Correct.

Q. During that same two-week period of time?

A. Right.

Q. Were there some discussions similar to these before you talked with Tony Lopez and Bill Lee?

A. No, there weren't.

Q. So it would have been after the Lopez and Lee discussions?

A. Yes.

Q. Who was the next person you spoke to after Lee regarding their disfavor with the Union?

[39] A. Shady Goodson.

Q. Now, what, insofar as you presently recall—I believe you have already testified that that occurred on June 19th?

A. Yes.

Q. Could you tell us how it is you know that it was June 19th?

A. I made a memo of the conversation.

Q. Would you tell us where that conversation took place?

A. It was in Jim Crocker's office.

Q. Who was present?

A. Jim Crocker, Shady Goodson and myself.

Q. Would you tell us what was said during that conversation by each of the persons present?

A. Okay. Jim and I didn't really know why Shady came in.

He did almost all of the talking, and he said that he was really in the middle of a situation that he found very uncomfortable. He was in the middle because the employees did not want to strike.

The Union did want the strike, and he as the chief job steward found himself making picket rosters, that the

people would not cooperate with him. He couldn't get them to man the lines.

He said that he had to do the picket rosters without any help from the Union. He felt like they were paying their dues and not getting anything for it.

[40] He, in general—He kept expressing his frustration with the situation because he wanted it to be over with.

Q. Was there anything more?

A. He did indicate that J. R. Blackshire and Pete Doucette had expressed the same concerns as he, that the Union wasn't really supporting the people and assisting them with the strike as they thought it should have.

Jim Crocker didn't really respond in any way, nor did I.

Q. You all made no statements during that visit at all?

A. I can't remember any.

Q. How long did this meeting last?

A. Ten or 15 minutes.

Q. Who was the next person that you had such a conversation with?

A. It would have been J. R. Blackshire.

Q. Do you remember the date of Blackshire's discussion?

A. Yes. It was June 27th.

Q. Where did that one take place?

A. That took place in Tim Martin's office.

Q. Who was present?

A. Tim Martin and myself and J. R.

JUDGE BENNETT: How did that meeting come about?

THE WITNESS: J. R. came in to make a request for unconditional reinstatement.

[41] JUDGE BENNETT: Unconditional what?

THE WITNESS: Reinstatement.

JUDGE BENNETT: Unconditional reinstatement.

BY MR. MIDDLETON:

Q. Would you tell us what was said during that conversation, as you presently recall?

A. J. R. was upset. He—

Q. Just a moment, Ms. Price.

JUDGE BENNETT: Just what he said.

THE WITNESS: Just what he said?

JUDGE BENNETT: Yes.

BY MR. MIDDLETON:

Q. Right.

A. Okay. He said he had gone on vacation during the lockout. He had returned to find the situation was as it was.

He walked the picket line for a while and then stopped because he found that the Union wasn't paying them to walk the picket line. He finally got paid to walk the picket line for one week, and they took out the Union dues which really, in his words, made him mad.

He also indicated that he had to go to the Union hall to pick up his strike money instead of them bringing it to him out on the line, so he quit walking the picket line.

He had also found another job at that point, but he [42] would like to have his job back with CMS.

Q. Was there any response to Mr. Blackshire's statements by you or by Mr. Martin?

A. Yes. I gave him a short little memo that he could sign stating that he was requesting the unconditional reinstatement, and it indicated to him that he should keep us informed of his current address and phone number so we could contact him.

Q. Were there any other verbal, other kinds of responses given by you or Mr. Martin to Mr. Blackshire's statements?

A. I can't remember any.

Q. Is that the extent of that conversation, insofar as you presently recall it?

A. No, it isn't.

Q. Would you tell us what you recall?

A. Okay. J. R. walked out of Tim Martin's office and went into the warehouse to see a couple of his friends.

I followed a couple of minutes later and he called me over to talk with me.

Q. Was this in the warehouse where he called you over to talk with him?

A. Yes.

Q. Who was present during that discussion between J. R. and yourself?

A. As soon as J. R. called me over to the side, I asked [43] Ian Knapp, the Operations Manager for Houston—

Q. What is the first name?

A. Ian, I-a-n Knapp, K-n-a-p-p. He was Operations Manager of the Houston branch, and I asked him to come over to listen to the conversation.

Q. So, there were three persons present, yourself, Mr. Knapp and Mr. Blackshire?

A. Yes, sir.

Q. This occurred in what area of the warehouse?

A. It was right by the shipping area, the packing area.

Q. Would you tell us what was said by each of the persons present during that conversation?

A. Ian and I said nothing.

Q. What did Mr. Blackshire say?

A. J. R. said that there was no Union, that the people were not supporting it, and he said two or three times that there is no Union anymore.

He then told us that there were other people that wanted to come back to work, and he also gave us names of some people he thought would be good employees that we ought to get back.

Q. Did he tell you who the other persons were that wanted to return to work?

A. He told me some of them, yes.

Q. Who did he tell you they were?

[44] A. He said Pete Doucette, Betty Goodson, Alvin Steele.

Q. How do you spell the last name?

A. S-t-e-e-l-e. And Shady Goodson.

Q. Who else did he say would be a good employee if rehired?

A. He—I'm not sure I will remember all of them. I think there were five.

He said Alvin Steele, Betty Goodson, Raymond Brunner and, offhand, I can't remember the others.

Q. Were there other remarks that were made during that particular conversation?

A. He repeated what he had said in Tim's office about being upset about the picket line and not getting his pay and the Union not supporting them. The conversation was lengthy. He just kept repeating himself.

Q. He just told you the same thing over and over?

A. Yes.

Q. Approximately how long did this conversation in the warehouse last?

A. I would say 15 minutes.

Q. Is there anything else you recall him saying during that conversation?

A. No, I don't, right now.

Q. Did you have any other conversations other than these two with Mr. Blackshire regarding his displeasure with the Union?

[45] A. No.

Q. Who was the next person you had such conversation with?

A. Shady Goodson.

Q. Well, that would have been when?

A. Oh. I was thinking—Never mind. Shady came in the next day to ask for reinstatement.

Q. Was there any discussion during that visit by Shady of any displeasure with the Union on his part?

A. I don't recall any. It : . .

JUDGE BENNETT: You stopped your answer. Did you want to say anything more?

THE WITNESS: I started to say it was a short conversation.

BY MR. MIDDLETON:

Q. That would have been on June 28th; is that correct?

A. Yes.

Q. Were there any other special discussions or have we now heard about all of those discussions with the employees who told you they were dissatisfied with the Union?

A. Well, I indicated there was notes of the conversation with Pete Doucette.

Q. Tell us about that conversation. When did it occur?

A. That was June 28th.

Q. Where did it take place?

A. In Tim Martin's office.

[46] Q. Who was present?

A. Tim Martin, myself and Pete Doucette.

Q. How did he happen to be there in Mr. Martin's office at that time?

A. Pete came in to ask for unconditional reinstatement to his job.

Q. And would you tell us, as you have done already with regard to the others, what was said by each of the persons present during the visit?

A. Pete said that he was sorry that the situation had occurred. He wanted his job back.

He had had many years with CMS. He liked his job. He liked the work he was doing, and he wanted his job back.

Q. Anything else?

A. No.

Q. How long did that conversation last?

A. About five minutes.

Q. Now, are there any other such conversations that you haven't told us about?

A. No.

Q. Did any one of those employees that you have just talked about who expressed their displeasure with the Union, hold any positions with the Union other than Mr. Blackshire and Mr. Goodson?

A. Pete Doucette was a job steward.

[47] Q. He was a job steward. And this was at the time of the statement; is that correct?

A. Yes.

Q. Had you dealt with each of them in the past in relations to any of the Union business?

A. Yes.

Q. I mean in their capacities as shop stewards?

A. Yes.

Q. That's true as to all three of them; is that correct?

A. I never dealt with J. R. that I can remember as a steward.

Q. Did anyone else that you know of in Management deal with him as a steward?

A. I'm sure they did, but I don't have any knowledge of it.

Q. Then how do you know that he was actually a steward?

A. I saw him on a list of stewards in one of the files.

Q. Did you receive a list of the stewards from the Union in accordance with some agreement you had?

A. No. I can't remember how they did that, if they wrote us a letter or what.

Q. When did you see that list?
A. I can't remember.
Q. Do you know where the list is at this time?
A. I would assume it's still in the file. I haven't seen [48] it for a long time.
Q. Do you recall when you last saw that list?
A. No.
Q. Did Blackshire tell you during the discussions that he was a shop steward?
A. I don't think he mentioned it.
Q. Are you basing your statement that he was a steward, then, upon what you saw in the files?
A. That and just conversations that Tim Martin and I would have.
Q. In any of the conversations that you and Mr. Martin had at some time prior to the time you talked to Blackshire?
A. No. At the time we talked to Blackshire.
Q. There was something said during that discussion that confirmed the fact he was a steward?
A. No. After the discussion.
Q. What was said?
A. Tim mentioned that J.R. was a leader in the group, that he wasn't a shop steward now but he had been.
Q. You stated in your affidavit that the Union had difficulty manning the picket line.
What is the basis for that statement?
A. We were told that by Shady Goodson. We also started seeing the numbers of people, the time spent on the picket dwindle.
[49] Q. That constitutes the basis for that assertion in your affidavit?
A. In addition to Shady Goodson telling us that, yes.
Q. In other words, there were two reasons for that. One is Shady Goodson's statement and your observation

of the amount of time the employees spent on the picket line?
A. Right.
Q. When did you first advise the Union that you doubted that it represented a majority of the unit employees?
A. That it didn't represent them?
Q. When did you first advise the Union that you doubted it represented a majority of the unit employees?
A. July 20th.
Q. That was in your telegram to the Union?
A. Yes.
Q. And now that you have given us the discussions, can you tell us more precisely when it was that you actually concluded that the Union no longer actually represented a majority of the employees?
A. I would have to say, based on the conversations, we concluded after J. R.'s, our conversation with J. R., and it was reconfirmed again with Clint Waller and Raymond Brunner.
Q. J. R.'s conversation being June 27th?
A. Yes.
[50] Q. In your telegram, I believe you stated that the—
JUDGE BENNETT: Are you talking about Appendix I?
MR. MIDDLETON: Let me take a quick look here to see if that is the correct one.
Correct, Judge. While this is in evidence as Appendix I to the General Counsel's Motion, Your Honor, I would just like to have it—I would like to show her the original of that document.
BY MR. MIDDLETON:
Q. And ask you if you recognize that as the telegram you sent to them on the 20th of July, 1979?

A. Yes.

Q. In here I notice that you also state that the May 25th offer is no longer available.

When did it become no longer available to the Union?

A. When it was rejected at our last negotiation session.

Q. When was that?

A. June 12th.

MR. MIDDLETON: May I have just a minute to look over my notes, Your Honor?

JUDGE BENNETT: We will take a five-minute recess.

(Whereupon, a short recess was taken.)

JUDGE BENNETT: On the record.

Does the General Counsel have anything further?

MR. MIDDLETON: Yes, Your Honor.

[51] BY MR. MIDDLETON:

Q. Ms. Price, while you advised the Union on July 20th by telegram that we have referred to earlier that you doubted its majority status among Union employees, you at no time told the Union what that doubt was based upon, did you?

A. No.

Q. And at no time did you . . .

MR. MIDDLETON: I will withdraw that.

JUDGE BENNETT: You were asked whether or not you had told the Union what your doubt was based on, and your answer was "no." Is that correct?

THE WITNESS: No, I did not tell them.

BY MR. MIDDLETON:

Q. Now, prior to the time that you gave your December the 14th affidavit that was attached to the Employer's Motion in opposition to the General Counsel's Motion for Summary Judgment, you never advised the NLRB of the matters contained in that affidavit, did you?

A. No, I didn't.

Q. And you never had your Counsel advise the Board of that same information, did you?

A. I—

JUDGE BENNETT: If you know.

THE WITNESS: I don't know.

[52] BY MR. MIDDLETON:

Q. Now, do you recall when the negotiations began that led to the lockout?

A. Our first session was May 2nd.

Q. And do you recall when the last such session occurred on these bargaining sessions?

A. June 12th.

Q. At that time you advised the Union that you were not prepared to make any movements on your May 25th offer; is that correct?

A. No. They advised me of that.

Q. The Union advised you of what?

A. That they were not—that he was not going to make any movement in that session.

Q. Well, did you not discuss your May 25th offer during that session?

A. Yes.

Q. What did you tell the Union about the May 25th offer at that time?

A. We went back through it again.

Q. It was in effect unchanged from May 25th; isn't that true?

A. That's true.

Q. And at that point the Union did not accept it; is that right?

[53] A. Correct.

Q. Did you advise the Union at any time that the May 25th offer was your last and final offer?

A. No.

Q. Was it in fact your last and final offer?

A. No.

Q. Did you make another offer subsequent to the May 25th offer?

A. No.

Q. Then it was, in fact, the last final offer that you made; is that not true?

A. It was the last offer, the last proposal we discussed.

Q. So it was the last and final proposal that you made to the Union on the new contract; is that correct?

A. Maybe we are talking semantics, but it is the last proposal we discussed in negotiations.

MR. MIDDLETON: May I have this marked as General Counsel's Exhibit 2?

(The document referred to was marked for identification as General Counsel's No. 2.)

BY MR. MIDDLETON:

Q. Let me show you what has been marked as General Counsel's Exhibit 2, and ask you if you can identify it, Ms. Price?

[54] A. That is a, I guess you would call it a, summary of the proposals which we discussed on May 25th and June 12th.

It is not the entire proposal.

Q. But is it substantially the proposal that we have been referring to as the May 25th offer?

A. Yes, I think I can say that.

Q. Would you like to examine it? There are several pages to it. There are really four pages, not all of which are full, but from looking at each of them does that appear to be the offer that we have been discussing this morning as the May 25th offer?

A. Yes it does.

MR. MIDDLETON: Your Honor, at this time, I would offer in evidence General Counsel's Exhibt 2, and ask per-

mission to withdraw it to make the appropriate copies to furnish to Counsel.

MR. MORSE: Just a moment, Your Honor, and let me verify this.

MR. MIDDLETON: I have the necessary copies, Your Honor.

MR. MORSE: We have no objection, Your Honor.

JUDGE BENNETT: I will receive it.

[55] (The document referred to, having been previously marked for identification as General Counsel's Exhibit 2 was received in evidence.)

MR. MIDDLETON: At this time I offer into evidence General Counsel's Exhibit 2 with the appropriate copies.

JUDGE BENNETT: It has been received.

BY MR. MIDDLETON:

Q. Now, except for the employees that you named in your testimony here this morning, Ms. Price, you have no knowledge of any other employees' displeasure with the Union; isn't that true?

A. I don't remember any other employees saying anything.

Q. And you don't have any reason to doubt your memory as to that, do you?

A. No.

Q. In preparing your testimony for this case did you have the occasion to review the notes from the discussions that you held with Mr. Blackshire and Mr. Goodson, Mr. Doucette and Mr. Brunner?

A. Yes, I did.

Q. Do you have those notes with you today?

A. Yes.

MR. MIDDLETON: At this time, Your Honor, General [56] Counsel would move for the production of those notes.

MR. MORSE: Your Honor, we intend to offer them in their entirety on our part of the case.

We will produce them now if the General Counsel is insistent on it.

MR. MIDDLETON: I would like to have the opportunity to review them, Your Honor, before I release the witness.

JUDGE BENNETT: All right. Counsel will produce them.

MR. MIDDLETON: May we go off the record a moment, Your Honor?

JUDGE BENNETT: Off the record.

(Discussion off the record.)

JUDGE BENNETT: On the record.

It has been suggested that the General Counsel inspect these notes and that we consolidate it with an early luncheon break, and everyone seems to be in agreement with that, including my hungry stomach.

Respondent has asked whether he, at my instructions, should be restrained from lunching with the witness.

I would not so order, with the caveat that Counsel is not to tell the witness what to testify or what not to testify to.

Is that agreeable?

MR. MORSE: Yes, Your Honor.

JUDGE BENNETT: I might add this was raised by [57] Respondent's Counsel of his own volition.

With that understanding, I have no objection to your lunching together. As a matter of fact, she is an attractive lady and if she were my witness I would have lunch with her.

On that basis, we will recess until 12:30.

(Whereupon, at 11:08 p.m., the hearing was recessed, to reconvene at 12:40 o'clock p.m., this same day, Tuesday, June 10, 1980.)

AFTERNOON SESSION

12:40 p.m.

JUDGE BENNETT: On the record.

You have had an opportunity to look over her notes; correct?

MR. MIDDLETON: Yes, I have, Your Honor.

Of course, I may not have made it clear. I wanted to review my own notes at that time, too, in addition to her statements.

JUDGE BENNETT: Very well. I trust this will be very brief?

MR. MIDDLETON: Hopefully, yes, I think so.

Would you mark these as General Counsel's Exhibt 3, through whatever number, please.

(The documents referred to were marked for identification as General Counsel's Exhibit No. 3, 4(a) through 4(c), 5(a) through (c) and 6(a) through (c).)

Whereupon,

ELIZABETH PRICE

resumed the stand and testified further as follows:

[59] **DIRECT EXAMINATION (Resumed)**

BY MR. MIDDLETON:

Q. Ms. Price, let me show you what has been marked for identification as General Counsel's Exhibit 3, and ask you if you would identify that for the Court, please?

A. Yes. These are notes that I prepared in Jim Crocker's office with his assistance right after our discussion with Shady Goodson.

Q. And the date?

A. June 19th.

Q. About 10:00 a.m.?

A. Yes.

Q. Was this the time when you prepared the notes at the time the conversation took place, actually took place?

A. At the time the conversation took place.

Q. I show you what has been marked as General Counsel's Exhibit 4(a) through 4(c), and ask you if you can identify that for the record?

A. 4(a) is Pete Doucette's request for unconditional reinstatement, and 4(b) is a transcription of my notes of that conversation, which are in shorthand on 4(c).

Q. I show you what has been marked for identification as General Counsel's 5(a) through (c), and ask if you can identify that document?

A. Okay. 5(a) is J. R. Blackshires's request for [60] unconditional reinstatement.

5(b) is the transcription of my shorthand notes of that meeting, which is 5(c).

Q. 5(c) is the shorthand notes that you made of the meeting?

A. Right.

Q. I hand you finally what has been marked as General Counsel's Exhibit 6(a) through 6(c), and ask if you can identify that document?

A. 6(a)is Raymond Brunner's request to retire. This is his request to us to process his retirement, and then 6(b) is a transcription of my notes at that meeting, which is 6(c).

Q. Of these documents you have just identified, none of those documents contain any statement signed by either of those individuals expressing any displeasure with the Union, do they?

A. No, they do not.

JUDGE BENNETT: Is it your custom to make records like these?

THE WITNESS: I try to whenever possible, yes.

BY MR. MIDDLETON:

Q. What was your purpose for making notes of these particular conversations and not those of Mr. Waller's?

A. I just didn't make notes of Mr. Waller's.

[61] Q. What purpose did you plan to use these notes for?

A. Just as memorandums for the record.

Q. For the record?

A. Yes.

JUDGE BENNETT: How would you explain your failure to do so in the case of Mr. Waller?

THE WITNESS: I really can't say, unless I just didn't have time or what-have-you.

JUDGE BENNETT: All right. Next question.

BY MR. MIDDLETON:

Q. Did you anticipate at that time you might be required to use these notes in some future proceeding involving the Union?

A. Well, I thought that what they were saying was important, yes.

Q. But my question is did you anticipate at the time you were making the notes that you might need them in some proceeding involving the Union?

JUDGE BENNETT: I think she has answered the question.

THE WITNESS: Yes.

BY MR. MIDDLETON:

Q. Now, isn't it a fact, Ms. Price, that under the last collective bargaining agreement executed between your Employer and the Union here there was a 60-day probationary period for new employees?

A. I think that – There was a probationary period. I don't remember if the contract was 60 or 90 days.

MR. MIDDLETON: Counsel, would you be willing to stipulate that the contract contained the 60-day probationary period for new employees?

I have a copy here. Specifically, it is Article VIII, Section 1.

MR. MORSE: We will stipulate to that, Your Honor.

JUDGE BENNETT: So stipulated.

MR. MIDDLETON: Just for the record, in the event it becomes a question later on, the contract we are referring to is one that is effective from the 22nd of May 1976 to and including the 21st day of May 1979.

MR. MORSE: We will stipulate to that, too.

JUDGE BENNETT: So stipulated.

Are you offering the exhibits?

MR. MIDDLETON: Not at this time, Your Honor. I may offer them later on. I need to proceed just a bit further.

JUDGE BENNETT: All right. Next question.

BY MR. MIDDLETON:

Q. Ms. Price, from your testimony, I gather that your doubts were based upon employee displeasure or what you perceived as to their displeasure with the Union was based upon information that you received from some 10 named employees, and if I have those names wrong, I would like [63] you to correct me.

Alvin Harper, Sandra Hutto, Tony Lopez, Bill Lee, Gilbert—I don't remember how you pronounced his last name.

A. Ozuniga, I think.

JUDGE BENNETT: Would you spell it for the record?

THE WITNESS: O-z-u-n-i-g-a.

BY MR. MIDDLETON:

Q. Raymond Brunner, Shady Goodson, Pete Doucette, Clint Waller and J. R. Blackshire?

A. I got the names, but I'm not sure what your question is.

Q. All right. These are the persons who expressed displeasure to you about the Union; is the correct?

A. No. Ozuniga never did.

Q. He did not. Can you say if any one of those persons who did not express displeasure to you about the Union?

A. Alvin Harper and Sandra Hutto.

JUDGE BENNETT: What, if anything, did those three do?

THE WITNESS: They crossed the picket line.

BY MR. MIDDLETON:

Q. Now, Mr. Ozuniga never was on check-off was he?

A. No.

Q. Sandra Hutto was never on check-off, was she?

[64] A. Correct.

Q. She was not?

A. She was not.

Q. Alvin Harper was not on check-off, was he?

A. No.

Q. Bill Lee was not on check-off, was he?

A. No.

Q. Gilbert Ozuniga was not on check-off?

A. No.

Q. In fact, Harper, Hutto and Lopez were all on probation, weren't they, at the time the lockout occurred?

A. I am not sure of that. I don't know their dates of hire.

Q. Other than for these persons that we have just named, do you have any knowledge of any other employee who did not support the Union at the time that you withdrew your recognition or made your decision to withdraw recognition of the Union?

A. None that I recall.

Q. What other factors, if any, did you base your decision to withdraw—

JUDGE BENNETT: Let's rephrase that. Did she make the decision.

MR. MIDDLETON: All right.

[65] BY MR. MIDDLETON:

Q. You did, in fact, make the decision, if I recall your testimony earlier, to withdraw recognition of the Union, did you not?

A. Yes.

Q. Did anyone else participate in that decision other than you?

A. Participate? I discussed it with my boss.

Q. Who is that person?

A. J. A. Rodenmeyer, R-o-d-e-n-m-e-y-e-r.

Q. What is Mr. Rodenmeyer's position with the Employer?

A. Senior Vice President.

JUDGE BENNETT: You discussed it with him and what came of that discussion?

THE WITNESS: We decided that they did not represent our employees, that they did not have the support of the employees.

BY MR. MIDDLETON:

Q. When did that discussion occur?

A. Throughout the time period involved.

Q. What is that time period?

A. From, I would say, starting with the lockout through July 20th.

Q. So, as early as June 4th you doubted the majority status of the Union; is that your testimony?

[66] A. We had an idea of that, and then through the discussions with other employees came to that conclusion.

Q. When you say with the other employees, which employees are you referring to?

A. Those that you have named.

Q. Now, did Mr. Rodenmeyer participate in any of those discussions with the employees?

A. No, he did not.

Q. So, the discussions Mr. Rodenmeyer had were just with you; is that correct?

A. Right.

Q. And you conveyed to him what you had gleaned from your discussions with these other employees during those discussions?

A. In a summary format, yes.

Q. And did he, in fact, agree with your assessment and conclusion . . .

MR. MIDDLETON: First of all, let me withdraw that.

BY MR. MIDDLETON:

Q. Who was the first person to conclude that the Union did not, in fact, represent a majority of the employees, between you and Mr. Rodenmeyer?

A. I was.

JUDGE BENNETT: I think the legal issue is who concluded that the Employer had a good-faith doubt.

[67] MR. MIDDLETON: I agree, Your Honor.

JUDGE BENNETT: I think that's the way the Board works it.

BY MR. MIDDLETON:

Q. Who was it between the two of you concluded that the Employer had, in fact, a good-faith doubt of the Union's majority status?

A. I did.

Q. Can you give us the time at which you first drew that conclusion?

A. Yes. After the discussions with Shady, J.R., Tony Lopez and Bill Lee.

JUDGE BENNETT: You have named how many people now?

THE WITNESS: Four, and then Clint Waller.

JUDGE BENNETT: That makes five?

THE WITNESS: Uh-huh.

BY MR. MIDDLETON:

Q. Now, after those discussions, how long after those discussions with those particular employees was it that you had your discussion with Mr. Rodenmeyer?

A. I talked—I had many discussions with him.

Q. I mean about the good-faith doubt of the Union's majority status?

A. I would say it was sometime early July when we had our first discussion, and then we would have subsequent ones.

[68] Q. Do you recall when you last had such a discussion before you communicated that position to the Union?

A. I probably discussed it with him every day that week.

Q. The week that you sent your July 20th telegram?

A. Right.

JUDGE BENNETT: And I gather he concurred in your judgment?

THE WITNESS: Yes, sir.

BY MR. MIDDLETON:

Q. And you were the only two persons involved in that decision; is that correct?

A. Yes.

Q. Now, were there any other reasons or basis, I should ask, for your decision that the Union no longer – pardon me – for your good-faith doubt the Union no longer represented a majority of the employees?

A. The fact that we had hired replacements and that we had had five people who crossed the picket line.

Q. Those five, among those, or included in those are those that we first named as the 10 employees that you have referred to in your earlier testimony; is that correct?

A. Correct.

JUDGE BENNETT: When you say five crossed the picket line you are talking about, and correct me if I am in error, five strikers who crossed the picket line?

[69] THE WITNESS: Yes.

BY MR. MIDDLETON:

Q. Could you tell us again who they were?

A. Sandra Hutto, Alvin Harper, Gilbert Ozuniga, Bill Lee and Tony Lopez.

Q. I am sorry. You got a little ahead of me. Alvin Harper –

A. Gilbert Ozuniga, Tony Lopez, Bill Lee.

Q. That's four.

A. And Sandra Hutto.

Q. You have named her. Let me see if I got it.

JUDGE BENNETT: Off the record. Let's not go through the names again.

(Discussion off the record.)

JUDGE BENNETT: On the record.

BY MR. MIDDLETON:

Q. Now, as I understand it, Ms. Price, your position is that the notes which you identified a few minutes ago as General Counsel's Exhibits 3 through 6 are complete and accurate descriptions of the conversations that you had with the employees in each of those documents; is that true?

A. Yes.

Q. And if I understand your testimony correctly, you took all of the shorthand notes contained in those documents?

A. Yes.

[70] Q. At the time the conversations actually occurred?

A. No. After the conversations occurred.

Q. Yes. I recall. It was after the conversations.

JUDGE BENNETT: For the record, I do not read shorthand, in the event you offer the exhibits.

MR. MIDDLETON: Yes. I had something in mind regarding that in the event they were to be offered.

Quite frankly, I was going to see whether or not we could get her to translate the shorthand for us.

JUDGE BENNETT: I will follow that.

I might add that when I was going to law school I wished I did take shorthand.

MR. MIDDLETON: So many times I felt the same way.

BY MR. MIDDLETON:

Q. You were the chief spokesman for the, spokesperson for the Employer during all of the bargaining sessions commencing on May 2nd through the last such bargaining session with the Union, were you not?

A. Yes.

Q. Now, I started asking this question once before, and I think I withdrew it.

Were there any other reasons . . .

MR. MIDDLETON: I withdraw that.

BY MR. MIDDLETON:

Q. I do recall that you have told us so far that your [71] good-faith doubt that the Union no longer represented a majority of the employees was based upon the conversations that you have described earlier today with the employees and upon the replacement and upon the fact that five employees crossed the picket line.

Were there any other reasons for that decision of yours?

A. Well, the fact that we haven't heard from the Union in such a long period of time.

Q. How long a period of time was that?

A. From June 12th through the time that we got the telegram on the 16th of July.

Q. Did the Federal Mediation and Conciliation Service not contact you during that time period regarding a bargaining session?

A. We were never contacted.

Q. Did FMCS, the Federal Mediation and Conciliation Service, at any time during the bargaining between the parties participate?

A. Yes.

Q. Did you not, in fact, hold your first bargaining session at the FMCS offices?

A. Yes, we did.

Q. Was not the June 12th bargaining session also held there?

A. Yes.

[72] Q. Does the name Dale Johnson ring a bell with you?

A. He was one of the Mediators.

Q. Do you recall who the other one was?

A. Richard Horne.

Q. Did either of them contact you at any time between the dates of July—pardon me.

Well, during this period of time when you state they didn't contact you?

A. After the June 12th meeting, no.

JUDGE BENNETT: I may be in error, but I think those gentlemen are precluded from testifying.

MR. MIDDLETON: That's true. Well, let me say that that's my opinion, Your Honor. I am not sure of that.

JUDGE BENNETT: Well, I have seen decisions holding their refusal to testify without permission from their superior, in the same context that you would be not permitted to testify without permission of the General Counsel.

MR. MIDDLETON: Correct.

JUDGE BENNETT: I think that's right. All right. Next question.

BY MR. MIDDLETON:

Q. You are not telling us, though, they never did make any contact with the Employer, are you, Ms. Price?

A. To my knowledge, they didn't contact us.

Q. And you are saying that the Union didn't make any [73] direct efforts, at least to your knowledge, they never made any direct contact with you during that time insofar as bargaining is concerned; is that true?

A. There was one letter of June 28th, I think, that referred to something that had occurred earlier in June prior to our June 12th meeting.

Q. Did you make any contact with the Union during that period of time?

A. No, I did not.

Q. I mean between June 12th and July 16th?

A. No, I did not.

Q. You didn't speak to them or write to them; is that correct?

A. Correct.

MR. MIDDLETON: That was really a duplicitous question.

BY MR. MIDDLETON:

Q. You did not speak to them between July 12th and July 16th regarding any of the bargaining efforts?

A. Right.

Q. You did not write to them between July 12th and July 16th?

A. I remember I wrote them a letter, now that I think about it, on the wage proposal but I don't know the date of that letter.

Q. Do you think it was, in fact, between those dates?

[74] A. (No response.)

MR. MIDDLETON: Let's mark this as General Counsel's Exhibit 7.

(The document referred to was marked for identification as General Counsel's No. 7.)

BY MR. MIDDLETON:

Q. Is this not the letter that you just alluded to?

A. That's it.

JUDGE BENNETT: And the date is?

THE WITNESS: June 18th.

JUDGE BENNETT: If I may say so, I think we are spending an awful lot of time with this witness.

MR. MIDDLETON: I think I am about finished, Your Honor. Let me just double-check some notes here.

JUDGE BENNETT: All right.

MR. MIDDLETON: Your Honor, I would like to say for the record, that the testimony elicited from the witness regarding conversations which she had with employees is not elicited or offered for the purpose of – pardon me – to establish the truth of the matters asserted therein, but merely to inquire into the basis of this witness' conduct she has described with reference to her withdrawal of recognition of the Union.

JUDGE BENNETT: I have in front of me the decision of [75] the Fifth Circuit in Randle-Eastern Ambulance Service cited by Respondent in its Cross-motion for Summary Judgment, specifically reported in 584 F.2nd 720 and 726 which, in my judgment – I should say my offhand superficial judgment, contains rather strong language, and I believe we are in the Fifth Circuit.

MR. MIDDLETON: That's true. I haven't read that part of the decision you are referring to. At least I don't know which part you are referring to right now.

Is it dealing with the issue of the admissibility of the testiony?

JUDGE BENNETT: No. You and I are in the same boat. We both read it superficially.

In any event, you say you are about through with the witness?

MR. MIDDLETON: Yes.

JUDGE BENNETT: Does the Charging Party have anything?

MR. REED: Anything I wish to say?

JUDGE BENNETT: What?

MR. REED. I am sorry, sir, I didn't hear what you said.

JUDGE BENNETT: Do you have any questions?

MR. REED: No, sir, no questions.

JUDGE BENNETT: All right.

MR. MORSE: I just have a few questions.

MR. MIDDLETON: Your Honor, before he proceeds, may I [76] ask one question of Counsel, and that is at this time is he going to examine the witness as his witness in chief or is this supposed to be cross-examination?

JUDGE BENNETT: Well, let's put it this way.

He is entitled to cross-examine your witness. If he chooses to put the witness on as his own witness, then she is his witness.

Are you talking about leading questions or otherwise?

MR. MIDDLETON: Well, leading questions, specifically, since I did call her pursuant to Rule 611(c), and as such I only called her as an adverse witness rather than my own witness and, consequently, I am not vouching for the credibility or anything of the witness.

JUDGE BENNETT: Why don't we approach it this way, and I suggest this to the Respondent.

I may be circumscribing you, but why don't you examine the witness as though she were your own at this point and then we won't have any problem.

MR. MORSE: Fine.

JUDGE BENNETT: I am not indicating that you are not entitled to.

We will avoid it that way.

MR. MORSE: Thank you, Your Honor.

[77] **CROSS-EXAMINATION**

BY MR. MORSE:

Q. Ms. Price, let me ask you, to your recollection how long did this lockout that you referred to in your earlier testimony last?

A. It was from June 1st until the night of the negotiations on June 12th.

Q. May I ask you, please, were there any employees who were members of the bargaining unit made the subject of this proceeding work at any time during this lockout?

A. We had five people cross the picket line.

Q. Did any of the people–

MR. MIDDLETON: Objection. I move to strike as not responsive.

JUDGE BENNETT: I am not sure it was, but the answer may stand.

Ask another question, and perhaps a little more slowly.

BY MR. MORSE:

Q. Ms. Price, let me ask you this; did any of the employees in the bargaining unit work during the lockout or did you lock out all of the employees in the bargaining unit?

A. No. During the lockout we did not work any of the employees in the bargaining unit.

Q. Who worked in the warehouse doing the bargaining unit [78] type work during the lockout?

A. It was our Management and professional people.

Q. Now, let me ask you this:

Based upon your testimony in this matter when would it have been, based on your best recollection, that you had your first conversation with Mr. Lopez about his feelings about the Union?

A. After he had come back to work the first or second week in June.

Q. Now, you also referenced Mr. Ian Knapp in your earlier testimony as being present when you had your conversation with Mr. Goodson; is that correct?

A. With J. R. Blackshire.

Q. Is Mr. Knapp still with CMS?

A. No, he is not.

Q. Where does he reside now, please?

A. I think he is in El Paso, Texas.

JUDGE BENNETT: Do you know when he left, roughly?

THE WITNESS: Somewhere around December 1979.

BY MR. MORSE:

Q. Your testimony earlier was, I believe, that you never gave the Union the reasons for your good-faith doubt prior to your testimony here today; is that right?

A. That's right.

Q. Did the Union ever ask you for any explanation?

[79] A. No.

Q. Just one other point.

Did there come a time during the time frame that we have been discussing when you had an occasion to go out in the warehouse and visit with some of the new employees that we have hired as replacements for the striking employees?

A. Yes. I was out there on a daily basis, but after they had been with us about two or three weeks I went out and specifically talked to some of the individuals.

JUDGE BENNETT: Roughly how many?

THE WITNESS: I think there were like 12 or 13.

JUDGE BENNETT: Out of how many?

THE WITNESS: Out of about 25 at that point.

MR. MORSE: May I ask you this, Ms. Price:

At any time during the discussions that you have just described for us about being with the replacements or in any of the other conversations that you have described for us with striking employees, did you ever openly solicit from them information concerning their support for the Union?

A. No, I did not.

MR. MIDDLETON: Objection. Leading.

JUDGE BENNETT: The objection came in late. I will entertain it, and it's overruled.

BY MR. MORSE:

Q. Ms. Price, during the discussions that you had with [80] the replacement employees that you have just described for us, can you tell us, please, whether or not any of those employees volunteered to you any remarks one way or another about their support for the Union?

A. One man—

MR. MIDDLETON: Objection.

JUDGE BENNETT: Overruled. You may answer.

A. (Continuing) One man did.

BY MR. MORSE:

Q. What was his name, please?

A. David Schneider.

Q. Do you have any record of that?

A. Yes. I have handwritten notes of what I discussed with the employees.

JUDGE BENNETT: What, if anything, did he say?

THE WITNESS: He indicated that he had belonged to unions and he had not belonged to unions, and he, from what he could see, didn't think that this Union represented the people and it just wasn't needed at the Company.

JUDGE BENNETT: All right. Next question.

MR. MORSE: That's all I have, Your Honor, at this time. I reserve the right to recall the witness later in the proceeding.

JUDGE BENNETT: All right. You have that right.

[81] **REDIRECT EXAMINATION**

BY MR. MIDDLETON:

Q. Where does Mr. Knapp work at this time, Ms. Price?

A. I don't know.

Q. You are sure, though, he is in El Paso?

A. No. I said I think he is in El Paso. That's what I had heard.

Q. Who did you hear that from?
A. One of his friends that still works at our Company, I think.
Q. Do you remember who that person is?
A. Dave Kagey, K-a-g-e-y.
Q. Is that somebody on your managerial staff?
A. He is a staff individual.
Q. What position does he hold?
A. At this point, Director, Coulter Marketing, C-o-u-l-t-e-r.
Q. When did you hear that from Mr. Kagey?
A. I can't tell you. Sometime after Ian left.
Q. Would you say it was in 1980 or 1979?
A. I can't tell you.
Q. Now, there were, in fact, 27 employees in the bargaining unit, were there not?
A. Yes, there was.
Q. And how many of those persons did you permanently [82] replace?
A. All of them. Well, all—
Q. All 27?
A. No. The five that have crossed the picket line, we didn't replace.
JUDGE BENNETT: I don't know if I follow you. You said five crossed the picket line?
THE WITNESS: Yes.
JUDGE BENNETT: How about the others?
THE WITNESS: They did not cross the picket line, and we replaced them.
JUDGE BENNETT: Twenty-two, is that a fair statement?
THE WITNESS: Yes.
JUDGE BENNETT: Did not cross the picket line?
THE WITNESS: Correct.
JUDGE BENNETT: And you replaced those 22?

THE WITNESS: Yes.
JUDGE BENNETT: Next question.
BY MR. MIDDLETON:
Q. Now, can you tell us the date upon which you—did you hire replacements for all 22 of these individuals at the same time?
A. Yes, we did.
Q. Can you tell us what the date was?
A. June 25th.
[83] JUDGE BENNETT: And you replaced all 22 on that date?
THE WITNESS: Yes.
BY MR. MIDDLETON:
Q. How many of those persons were still working there on July 20?
A. All but four of them.
Q. Were those positions vacant at that time, those four positions?
A. They really weren't vacant at that time. We—Oh, how do I explain this. We had—No, they were not vacant.
Q. Did you have employees working in those four positions?
A. No.
JUDGE BENNETT: If I follow you correctly, you needed four less people?
THE WITNESS: We hired 29. Four had terminated.
BY MR. MIDDLETON:
Q. So, when you replaced the striking employees you hired additional employees as well?
A. Yes.
Q. And, if I understand your arithmetic, you hired seven additional employees; is that true?
A. Yes.
Q. So, at that time the bargaining unit, as you see it, would have had 34 employees in it?

A. As of July 20th?

[84] Q. Yes.

A. It would have—

JUDGE BENNETT: You can answer that yes or no or you don't know.

THE WITNESS: I don't know.

BY MR. MIDDLETON:

Q. What was the count—when did you last have a correct count of the number of employees in the unit?

A. We always have a correct count. I don't know what you are asking.

Q. What was your last count of the number of people in the unit prior to July 20th, 1979?

A. I think it was 25, plus the five individuals who crossed the line. I don't—

MR. MORSE: Judge, we can—I am sorry. We can clear this up.

JUDGE BENNETT: Go ahead.

MR. MORSE: We have got all of this laid out in an exhibit and we plan to offer it.

I think the General Counsel has exceeded my cross, so to speak, and it really isn't proper anyway.

JUDGE BENNETT: Well, technically speaking, redirect is intended to cover matters brought up on cross.

MR. MIDDLETON: The replacements were the subject of his cross-examination.

[85] MR. MORSE: I would renew my objection.

JUDGE BENNETT: I am inclined to feel that inasmuch as the Respondent has those exhibits which will be coming in that you will have ample opportunity to cross-examine on it.

MR. MIDDLETON: Then I won't pursue it any further in light of his representation.

JUDGE BENNETT: Right, and I will hold him to it.

MR. MIDDLETON: There is one thing I completely forget in reference to General Counsel's Exhibits 3 through 6, the matter involving the shorthand.

Those are the statements that were identified by Ms. Price as being the ones taken immediately after the discussions with the employees.

What I would like to do is to examine her very briefly regarding the comparison between the longhand version and the shorthand version of those documents, if you would permit me do digress for a minute.

JUDGE BENNETT: You could spend three days doing that.

MR. MIDDLETON: It is not that I want to get the details but just for any variation there may be between her translation of the shorthand. Otherwise, I would offer to introduce everything except the shorthand.

JUDGE BENNETT: I will permit you to ask her if there is any variation between the shorthand and the ultimate [86] version thereof.

MR. MIDDLETON: I notice in the longhand version there were some shorthand symbols in the paragraphs themselves, which I would like to—

JUDGE BENNETT: I think you may be getting into Pandora's Box.

If you want to go ahead with it, I will permit it briefly and intervene when I think appropriate.

Specifically, I am permitting you to examine her as to what variations, if any, there are between her shorthand and the ultimate version thereof.

MR. MIDDLETON: As I said, there is one—I may just show it to Your Honor so you will understand what I am referring to.

In the longhand version here there is some shorthand writing.

JUDGE BENNETT: You have shown me GC 3.

MR. MIDDLETON: Correct. Near the top along with the longhand there is some shorthand writing there.

I am interested in pursuing the explanation of the translation of that.

JUDGE BENNETT: You have the advantage over me. It says, "June," dash "19, 10:00 o'clock," and then there is another word after it.

MR. MIDDLETON: Well, I am referring to this [87] (indicating).

JUDGE BENNETT: You are referring to the second paragraph.

I think in all fairness it should be shown to the witness. Why don't we show the witness the shorthand version, and I am indicating the first line of Paragraph 2. Why don't you show her the reproduction thereof and ask her to explain it.

MR. MIDDLETON: This is the only statement. There is no reproduction of General Counsel's 3. It is a one-page document.

JUDGE BENNETT: All right.

BY MR. MIDDLETON:

Q. Would you explain to the Court what the fact . . .

MR. MIDDLETON: If it is agreeable with the parties, since this may become a part of the record.

JUDGE BENNETT: I am going along with you. Ask her.

MR. MIDDLETON: All right.

BY MR. MIDDLETON:

Q. Would you tell us on the first line, the second paragraph, first line, after the two words, "Asked him," there appears a shorthand statement.

Would you tell the Court what this is?

A. "To come in."

JUDGE BENNETT: Would you repeat that?

[88] THE WITNESS: "To come in."

JUDGE BENNETT: To—

THE WITNESS: Come in.

JUDGE BENNETT: To come in?

THE WITNESS: Yes.

JUDGE BENNETT: That's t-w-o, come, c-o-m-e, in, i-n? Is that what you are saying?

THE WITNESS: T-o, to come in.

JUDGE BENNETT: To come in. So, if I follow you correctly, and correct me if I am in error, it is t-o c-o-m-e i-n, three words; correct?

THE WITNESS: Correct.

A. (Continuing) This (indicating) is a period.

BY MR. MIDDLETON:

Q. So, the entire first sentence of Paragraph 1 would read, "Finally he called Jim. Asked him to come in."

A. Correct.

Q. Let me direct your attention to the sentence beginning with a capital S, capital G.

JUDGE BENNETT: Where are you pointing to now?

MR. MIDDLETON: This is the beginning of the second—Let me rephrase that.

There are two sentences that begin with a capital S, capital G, and I am referring to the second such sentence which reads in part, "SG did all the talking. He wanted [89] his," and then there is a shorthand phrase which I would ask her to interpret.

JDUGE BENNETT: Would you interpret that shorthand phrase?

THE WITNESS: "job back."

BY MR. MIDDLETON:

Q. So, it should read, "SG did all the talking. He wanted his job back," period?

A. Correct.

Q. SG refers to whom?

A. Shady Goodson.

Q. Would you take a look—I believe there is at least one other shorthand expression.

JUDGE BENNETT: Would you identify it?

MR. MIDDLETON: All right. The very last phrase on the document above the General Counsel's Exhibit 3 for identification.

THE WITNESS: That is not shorthand. It is supposed to be u-s, us.

BY MR. MIDDLETON:

Q. Would you take a look at the document and tell us if there is any other shorthand contained therein?

A. No, there is not.

Q. Let me now show you what is identified as General Counsel's Exhibit 4(a) through 4(c), I believe it is.

[90] JUDGE BENNETT: Four what?

MR. MIDDLETON: 4(a) through 4(c). 4(c) is the shorthand version, perhaps, of some of the statements.

BY MR. MIDDLETON:

Q. Would you describe to the Court what 4(c) is, identify for the Court?

A. 4(c) are shorthand notes of a conversation with Pete Doucette, and another conversation with Raymond Brunner.

MR. MORSE: May I approach the witness, Your Honor?

JUDGE BENNETT: Please do.

BY MR. MIDDLETON:

Q. Is there anything in the conversation with Pete Doucette . . .

MR. MIDDLETON: Let me rephrase it.

BY MR. MIDDLETON:

Q. The conversation that you have there in shorthand with Pete Doucette, does it refer to any other part of General Counsel's Exhibit 4? Is it a translation, is General

Counsel's Exhibit 4(b) a translation of General Counsel's 4(c), so far as Doucette's part is concerned?

A. Yes, it is.

JUDGE BENNETT: What type of shorthand do you take?

THE WITNESS: Gregg.

JUDGE BENNETT: And you have taken it for how many years?

[91] THE WITNESS: Since high school, I guess.

JUDGE BENNETT: Well, I would refrain from asking you when you got out of high school.

BY MR. MIDDLETON:

Q. Would you read to the Court the first shorthand statement on the top of the page that's identified as General Counsel's Exhibit 4(c)?

A. Okay. It says, "He would rather work than be out on the picket line."

JUDGE BENNETT: And you are reading from your shorthand?

THE WITNESS: Yes.

BY MR. MIDDLETON:

Q. That was the first sentence you just read to us; is that correct?

A. Yes.

Q. Would you identify each sentence, at least, when you come to the end of each sentence?

A. Okay. The next sentence is, "He was used to the work and he liked the people and the work. He had worked for CMS a long time and wanted to work here again."

JUDGE BENNETT: And the record may indicate she is reading from her shorthand.

BY MR. MIDDLETON:

Q. Now, underneath the statement you have just read, the same document, General Counsel's 4, is another state-

ment in [92] which in longhand seems to be headed, "Raymond Brunner"?

A. Correct.

Q. Would you read us the shorthand statement, as you did above?

A. "Came to the decision to retire because he didn't want to work with those Union people again."

JUDGE BENNETT: The record may indicate that she is reading rather fluently or fluidly, as the case may be.

A. (Continuing) The second line is, "He wanted out," comma, "his wife was working and he just didn't want to mess with the Union. He thought the Union protected the wrong employees and that they haven't negotiated very good. He thought the strike was totally unnecessary and was the Union's fault."

BY MR. MIDDLETON:

Q. Now, when did you make those notes?

A. These were after the conversations.

Q. At what point in time did you make the notes regarding Mr. Brunner's statement there?

A. July 12th.

Q. Did Mr. Brunner speak to you on the same day that Mr. Doucette did?

A. No, he did not.

Q. Did you make the original shorthand notes of Mr. Brunner's statement on the same sheet of paper that you made [93] the shorthand notes of Mr. Doucette's conversation?

A. Yes. It was on a yellow pad.

Q. Now, when was it, again, that Mr. Doucette—was that June 28th that you talked to Mr. Doucette?

A. Yes.

Q. And made these notes?

A. Right.

Q. That is so on General Counsel's 4(c) that you made these notes.

When was it that you had the conversation with Mr. Brunner?

A. July 12.

Q. July 12th. Where did that conversation take place?

A. In Tim Martin's office.

Q. Is that one of those that you described for us earlier this morning?

A. Yes, it is.

JUDGE BENNETT: I think we have covered this rather fully.

BY MR. MIDDLETON:

Q. I direct your attention to General Counsel's 5(c) and ask if you can tell the Court what 5(c) is.

A. This is shorthand notes from a conversation, or two conversations that I had with J. R. Blackshire, both on June 27th.

[94] Q. Would you be kind enough to read the contents of General Counsel's Exhibit 5(c) for us and, if you would, indicate when you come to a period?

A. It starts out with the initials ATM. That stands for Allen T. Martin, who was in the room with me.

"J. R. came back after vacation and was absolutely apologetic," period. "He holds nothing against the Company and thought that it was too bad. He returned the key to the cage," period.

JUDGE BENNETT: What does the reference to the key mean?

THE WITNESS: J. R. was responsible for a locked cage where we kept very expensive items such as platinum, stopwatches, this kind of things, and so he came to give us the key so we could get in.

JUDGE BENNETT: All right. Next question.

BY MR. MIDDLETON:

Q. Would you continue reading this for us?

A. Yes. "He refused to walk the picket after a while because he was dissatisfied with the Union. Then he got another job. He came back and asked for his job," period.

JUDGE BENNETT: On this occasion?

THE WITNESS: Yes.

BY MR. MIDDLETON:

Q. "On this occasion" is not in the document, though, is [95] that correct?

A. No. "J. R. was very outspoken against the Union. He expressed considerable animosity about the lack of pay for walking the picket. He was absolutely appalled that they took the Union dues out of his first check. He got no more pay and had to go to the Union hall and pick it up. J. R. indicated that the Union was doing nothing for the employees and he couldn't support a Union like that."

JUDGE BENNETT: From my observation the witness has read the shorthand with what I would say, with reasonable facility.

MR. MIDDLETON: There is still more to go yet.

JUDGE BENNETT: Continue.

THE WITNESS: Okay.

A. (Continuing) The next paragraph says, "Ian and I." This is when we stepped out of the room and into the warehouse and Ian walked up.

BY MR. MIDDLETON:

Q. Before you go into that, the conversation that you just read, this section that you just read to us, was a part of the conversation that occurred in Mr. Martin's office?

A. Correct.

Q. Where just the three of you, Mr. Martin, Mr. Blackshire and yourself were present?

[96] A. Right.

JUDGE BENNETT: Has she finished the shorthand?

MR. MIDDLETON: She is going to the next conversation down here which occurred in the warehouse.

JUDGE BENNETT: Go ahead.

A. (Continuing) "He kept telling us that there wasn't a Union. They have lost all of the support from the employees in the unit. There were many others who wanted to come back and didn't want the Union to represent them anymore. They like him simply didn't want anything to do with that Union. We told him to tell them to come in and sign a sheet of paper like he did if they wanted their job back."

This is a quote. "I have no grudge against anyone except the Union because they didn't do a good job representing the people and getting a contract."

Paragraph. "He didn't work on the picket because he just didn't support the Union. The Union protected the bad employees and those that were good didn't get any help."

Another paragraph. "They," and in parenthesis there is a 5, close parenthesis.

"Never had any problem," in longhand, "getting through the picket line."

The next line says, "Protected the bad employees."

Then there are two longhand sentences at the bottom.

[97] BY MR. MIDDLETON:

Q. Okay. Would you read them for us?

A. It says, "They at no time expressed support for the Union. Shady," dash, "Pete didn't help him."

Q. Now, does that entire document that you just read, are you purporting that those words came from Mr. Blackshire?

A. Yes.

Q. Let me direct your attention now to 5(b), the very last paragraph there.

Would you explain that reference to us to what you just read?

A. It—

Q. Well, maybe you should read that to yourself.

A. "There's a note that says 'They,' parenthesis, five, close parenthesis, 'never had any problem in getting through the picket line.' A couple of lines down there's another note that said, 'protected the bad employees.' The two notes at the very bottom of the page do not mean anything to me at this point."

Q. Now, what does that mean? Who is the "me" that you referred to?

A. Me. In other words, I don't know what significance those notes were.

JUDGE BENNETT: I still say in my observation the witness has read the material shown to her relatively [98] rapidly.

BY MR. MIDDLETON:

Q. Now, finally, we come to General Counsel's Exhibit 6. I direct your attention . . .

MR. MIDDLETON: Just a second. I think we may have completed it.

JUDGE BENNETT: I would hope so.

Based on her prior examination I would say that she reads her shorthand quite well.

BY MR. MIDDLETON:

Q. For the record, I will ask you, is General Counsel's Exhibt 6(c) and General Counsel's Exhibit 4(b), are those two the same document?

A. Yes, they are. I think that's 4(c).

Q. In other words, 4(c) is the same as General Counsel's 6(c)?

A. Correct.

Q. And you have placed them in those order for other reasons; is that correct? I notice that 6(c) refers, of course,

to Mr. Brunner's statement. It is just because you wanted to have a complete document there; is that correct?

A. Right.

MR. MIDDLETON: I pass the witness, Your Honor.

JUDGE BENNETT: We will take a five-minute recess.

(Whereupon, a short recess was taken.)

[99] JUDGE BENNETT: On the record.

Does the Respondent have any cross at this point?

MR. MORSE: I don't believe so, Your Honor. We have nothing further of the witness at this time.

JUDGE BENNETT: All right.

Now, the General Counsel has Exhibits 3 through 7 identified.

MR. MIDDLETON: General Counsel's 2 through—

JUDGE BENNETT: Well, according to my notes 2 is in.

MR. MIDDLETON: I'm sorry.

JUDGE BENNETT: In any event, I will re-affirm it. Exhibit 2 is in.

How about 3?

MR. MIDDLETON: I haven't offered 3 through 7, Your Honor.

JUDGE BENNETT: Do you wish to or otherwise?

MR. MIDDLETON: Let me see what 7 is. I don't recall what 7 is.

JUDGE BENNETT: No. 7 is the June 18 letter.

MR. MIDDLETON: Well, Your Honor, I don't wish to offer either of those at this time.

JUDGE BENNETT: All right. We will leave them in limbo, then.

Respondent has nothing of this witness. You are excused.

[100] (The witness was excused.)

JUDGE BENNETT: Does the General Counsel have anything further?

MR. MIDDLETON: Yes, Your Honor. At this time Counsel for the General Counsel calls Mr. Howard Reed. Whereupon,

HOWARD E. REED

having been first duly sworn, was called as a witness herein and was examined and testified as follows:

JUDGE BENNETT: State your name and address for the record.

THE WITNESS: Howard E. Reed.

JUDGE BENNETT: R-double e-d?

THE WITNESS: Yes, sir. 3527 Mattye Maye, Pasadena, Texas.

DIRECT EXAMINATION

BY MR. MIDDLETON:

Q. Mr. Reed, where are you employed?

A. With Teamsters General Drivers, Warehousemen and Helpers Local Union 968.

Q. How long have you held that position? Well, pardon me. What position do you hold?

A. I am a Business Representative hired by the Local Union.

I'm also an elected official in the Local Union. I am [101] the Recording Secretary.

JUDGE BENNETT: You say the "Local Union."

Where is its office?

THE WITNESS: At 3100 Katy Freeway.

JUDGE BENNETT: In Houston?

THE WITNESS: Houston, Texas, yes, sir.

BY MR. MIDDLETON:

Q. And that's Local 968?

A. Yes, sir.

Q. Have you had any dealings with Curtin Matheson Scientific, Inc., in your capacity as Business Representative for the Union?

A. Yes, I have.

Q. Would you tell us what type of dealings you have had with them in that capacity?

A. I was assigned the Curtin Matheson contract sometime in early May of 1977, and I serviced that contract up until it expired in—I also opened the contract for negotiations to negotiate a new contract, and I was the spokesman for the Union during the course of the negotiations.

Q. Now, when you say when the contract expired, when did it expire?

A. It expired on May 21, 1979.

Q. When did you commence your negotiations for the new contract?

[102] A. The first meeting that we had was on May the 2nd, 1979.

Q. To you knowledge, had the Union been party to any collective bargaining agreements with the Employer Curtin Matheson Scientific prior to the one that most recently expired?

A. Yes, sir.

Q. To your knowledge, had the Union represented that group of employees, that is, the group that's covered by those contracts that you just referred to since it was certified by the Board back in 1970?

A. Yes, sir.

MR. MIDDLETON: I would like to ask Counsel at this time if Counsel for the Employer would be willing to stipulate that the Union is a labor organization within the meaning of the Act?

MR. MORSE: We will be glad to, Your Honor.

JUDGE BENNETT: So stipulated.

MR. MIDDLETON: Thank you.

BY MR. MIDDLETON:

Q. You mentioned that you represented the Union as the chief spokesperson in efforts to negotiate a new contract commencing as of when?

A. On May the 2nd, 1979.

Q. And would you tell the Court where those negotiations began?

[103] A. We had made arrangements for a meeting room at the offices of FMCS at the Federal Building downtown on Rusk Street.

Q. Is that where you conducted the first session?

A. Yes.

Q. Now, did the FMCS participate in that particular session?

A. No, sir.

Q. So, you just used their facility as a convenience; is that correct?

A. That's correct.

Q. Who was present for the Union on that occasion?

A. Myself, Mr. Shady Goodson—

Q. Is that the same Mr. Shady Goodson that we have heard testimony about this morning?

A. Yes, sir, and I believe Mr. Pete Doucette was also present.

Q. Now, was Mr. Doucette the same Mr. Doucette we have heard about here earlier?

A. Yes, sir.

Q. What were their official, if any, capacities or what official capacity, if any, did they appear in at that time?

A. Mr. Goodson was the chief steward on behalf of the employees at CMS and Mr. Doucette was a department steward at CMS, but they were at the negotiations because they had [104] been elected by the membership to serve in that capacity on the negotiation committee.

Q. So, they were members of the employee bargaining and negotiating committee?

A. Yes, sir.

Q. Who was present at that time for the Employer?

A. Ms. Price was present, Mr. Martin was present, Mr. Crocker was present and I believe a gentleman by the name of Knapp was present.

JUDGE BENNETT: If it helps the General Counsel any, I notice that in the Respondent's Answer admits Paragraph 17 and 19 of the Complaint.

MR. MIDDLETON: I didn't have that before me, really. I had better take a look at it.

JUDGE BENNETT: Specifically, that on or about July 20 the Union requested certain information, and in Paragraph 19 the Respondent refused to furnish that information.

MR. MIDDLETON: That is correct.

JUDGE BENNETT: So I see no need of getting into that.

MR. MIDDLETON: That's not what that question was directed to, Your Honor.

JUDGE BENNETT: All right.

MR. MIDDLETON: The conversation that just elicited testimony about—pardon me—the negotiating sessions was the opening negotiating session.

[105] JUDGE BENNETT: If I follow the pleadings correctly, Respondent raises "a good-faith doubt" as to the Union's majority.

MR. MIDDLETON: That is true.

JUDGE BENNETT: And that is the issue before us.

MR. MIDDLETON: That is true.

JUDGE BENNETT: So I think anything other than that is superfluous.

MR. MIDDLETON: That is true.

JUDGE BENNETT: So I think anything other than that is superfluous.

MR. MIDDLETON: Well, I think somewhere in the pleadings there was some reference to a May 8th date as to

the opening, but I think Counsel did admit in the Answer to the Complaint that—

JUDGE BENNETT: Paragraph 12 alleges that on or about May 25 Respondent made its "last and best offer."

MR. MIDDLETON: Paragraph 11 also alleges that on or about May 2nd the Union and Respondent—

JUDGE BENNETT: They commenced negotiations.

MR. MIDDLETON: Correct, and somewhere—Counsel can correct me if I am wrong, but I believe in the Cross-motion for Summary Judgment there is some reference to—

JUDGE BENNETT: Well, never mind the Motions for Summary Judgment.

* * * * *

[109] MR. MIDDLETON: Would you, in that case, be willing to stipulate up until that date the Union was the representative of the majority of the employees in the bargaining unit described in Paragraph 18?

MR. MORSE: May I have a moment?

MR. MIDDLETON: Sure.

MR. MORSE: We will do that if you will also agree, and I think this will really expedite this hearing, if you will also stipulate that at the June 12th bargaining session the Union rejected the Company's May 25th offer.

MR. MIDDLETON: In that case I need to confer with the witness who is now on the stand who happened to be the person who was in charge that day.

JUDGE BENNETT: Well, why don't you do that?

Off the record.

(A one-hour recess was taken.)

JUDGE BENNETT: On the record.

The parties have been conferring during the extended recess, and apparently they have arrived at a stipulation.

MR. MIDDLETON: That's true, Your Honor.

JUDGE BENNETT: All right. Then would you read it for the record.

MR. MORSE: Yes, Your Honor.

On or about May 25th, 1979, Respondent made its last contract offer to the Union. Such contract offer of May 25th, [110] 1979, constituted a full and complete collective bargaining contract, as offered, with respect to the terms and conditions of employment of the employees in the unit described above in Paragraph 8 of the Complaint.

On or about May 29th, 1979, the Union rejected Respondent's last contract offer of May 25th, 1979.

On June 12th, 1979, the Respondent renewed its last contract offer of May 25th, 1979.

On June 12th, the Union again rejected the Respondent's last contract offer of May 25th, 1979.

On or about July 16th, 1979, the Union notified Respondent that the unit employees had voted to accept Respondent's last contract offer of May 25th, 1979.

Since on or about July 19th, 1979, the Union has requested Respondent to execute a written contract embodying the Respondent's last contract offer of May 25th, 1979, described above.

Since on or about July 20th, 1979, Respondent has ·iled and refused to execute a written contract embodying ıe terms of the collective bargaining contract as offered ·ay 25th, 1979, and as described in Paragraph 13 above. ·hat ends the stipulation.

JUDGE BENNETT: Does the Union join in the stipulation?

THE WITNESS: He is presenting the case for us, Your Honor.

[111] JUDGE BENNETT: Do you concur in what the General Counsel says?

THE WITNESS: Yes.

MR. MIDDLETON: Your Honor, may we just say for the record, Paragraph 13 refers to Paragraph 13 of the Complaint as just recited in the stipulation.

JUDGE BENNETT: All right.

MR. MORSE: Your Honor, there is one further part of the stipulation.

On June 12th, 1979, the Union continued as the exclusive collective bargaining representative of the employees in the unit described above in Paragraph 8.

JUDGE BENNETT: Is that agreeable?

MR. MIDDLETON: That's agreeable, Your Honor, to the General Counsel.

JUDGE BENNETT: And the Union Representative says you are authorized to speak for him?

MR. MIDDLETON: I think so.

Would you so agree, Mr. Reed?

THE WITNESS: Yes.

JUDGE BENNETT: All right. That concludes the stipulation.

Do you have anything further of this witness?

MR. MIDDLETON: Very briefly, Your Honor. May I just check something else with Counsel?

* * * * *

[118] MR. MIDDLETON: I would like permission to withdraw the originals and make the appropriate copies.

JUDGE BENNETT: All right.

BY MR. MIDDLETON:

Q. Mr. Reed, can you tell us of your own recollection how many employees were on check-off as of May, the month of May 1979?

A. Twenty-three.

Q. Could you tell us—

A. No. I am sorry. Twenty-four in May.

Q. Twenty-four?

A. Yes.

Q. What was the number for June?

A. The number in June was 23, because there was one employee that terminated during that month, a Mr. Johnny Whittaker.

Q. Was there any such document submitted to the Employer for the month of July?

A. Yes, sir, I believe there was.

Q. Were there any dues received for that period of time?

A. No, sir.

Q. Could you tell the Court why?

A. Because the people had been on strike.

Q. No wages?

A. No wages.

[119] Q. During the period of time that was covered by that request?

A. Yes, sir.

Q. Have you tendered any such request since that time?

A. Yes, we have.

Q. Has there been any change insofar as . . .

MR. MIDDLETON: Well, I will withdraw that.

BY MR. MIDDLETON:

Q. As of July there were no dues submitted?

A. That's correct.

Q. Have there been any submitted since that time?

A. No, sir.

Q. Now, between the dates of June 12, 1979 and July 16, 1979, did you make any efforts to conduct further negotiating sessions with the Employer?

A. Between what dates? I'm sorry.

Q. Let me ask you this way:

After June 12th, 1979, did you make any efforts on behalf of the Union to conduct further negotiations sessions with the Employer?

MR. MORSE: Your Honor, I object to that on the grounds the stipulation is controlling as to any question to which that question could relate, and I just object to getting into that at all.

As far as I can tell, the only question before the [120] Court right now is the good-faith doubt issue.

MR. MIDDLETON: I don't know what part of the stip Counsel is referring to.

I don't think the stip went to the time, conduct regarding the Union between the dates of June 12 and July 16 in so far as bargaining efforts are concerned.

JUDGE BENNETT: If you will be brief, I will permit it.

MR. MIDDLETON: All right.

MR. MORSE: If it helps Counsel—I don't know if he understands what I—

JUDGE BENNETT: Just ask the question.

BY MR. MIDDLETON:

Q. Would you answer that?

A. What were the dates again?

Q. After June 12, 1979, did you do anything on behalf of the Union to conduct further bargaining sessions with the Employer?

A. Yes, I did.

Q. Would you tell us what you did and when?

A. Yes, sir. I called Mr. Johnson with the Federal Mediation and Conciliation Service and I requested that he contact the Company.

Q. When did you do that?

A. I believe it was on the 13th.

* * * * *

[122] Number one, Mr. Johnson cannot testify without the permission of his superior.

If you want to ask him what he did—

BY MR. MIDDLETON:

Q. What did you do after that time?

A. After June 12th?

Q. Well, after you contacted—

JUDGE BENNETT: You heard something from Mr. Johnson. What did you do next?

THE WITNESS: What I did next was, of course, I advised the people, the folks on the picket line—

JUDGE BENNETT: What did you do with respect to the Employer, if anything?

THE WITNESS: I did not contact the Employer.

BY MR. MIDDLETON:

Q. Did you make any further efforts after that conversation with Mr. Johnson in so far as the bargaining sessions were concerned?

A. Yes, sir. Again, I called FMCS again and requested that they set up a meeting.

Q. When was that next call placed?

A. That was placed on the 15th, I believe. Somewhere near the 15th?

Q. Of what month?

A. Of June.

[123] Q. Did you have any further such efforts after that date where you contacted FMCS and requested that they arrange further negotiating sessions between the parties?

A. No, sir, I did not, because—

JUDGE BENNETT: You have answered the question.

THE WITNESS: Well, I—

JUDGE BENNETT: You have answered the question. Next question.

BY MR. MIDDLETON:

Q. Now, did any of those contacts with Mr. Johnson or FMCS result in any further negotiating sessions between the parties?

A. No.

Q. Now, after your last effort with FMCS to arrange meetings with the Employer for negotiating sessions, did you do anything else?

A. No, sir. Just advised the people that the Company wouldn't meet.

Q. And why did you advise them that the Employer wouldn't meet at that time?

A. Because they knew I was attempting to get the Company to meet through FMCS.

MR. MORSE: Your Honor, I object to this entire line of questioning.

JUDGE BENNETT: I will sustain the objection.

* * * * *

[142] MR. MIDDLETON: But that is with the exception of 9(e)?

JUDGE BENNETT: Right. We now have R 6 through 9; correct?

MR. MORSE: Yes, Your Honor.

JUDGE BENNETT: Proceed.

Next question.

BY MR. MORSE:

Q. Ms. Price, have you had an opportunity to review Respondent's Exhibits 6(a), (b) and (c), Respondent's Exhibit 7, Respondent's Exhibits 8(a), (b) and (c) and Respondent's Exhibits 9(a), (b) and (c)?

A. Yes, I have.

Q. Can you identify them for us, please?

A. Those are the documents that I discussed earlier this morning as General Counsel's Exhibits 3 through 6.

MR. MORSE: On the basis of her former testimony we offer, Your Honor, Respondent's Exhibits 6(a), (b) and (c), 7, 8(a), (b) and (c) and 9(a), (b) and (c).

JUDGE BENNETT: You say these are the documents you referred to under examination by the General Counsel?

THE WITNESS: Yes, sir.

JUDGE BENNETT: Any objection?

MR. MIDDLETON: I have a couple of things.

One, I don't know exactly which of those is which of [143] the General Counsel's, at least which were identified as General Counsel's 2 or whatever.

JUDGE BENNETT: Does it make any difference?

MR. MIDDLETON: Yes.

JUDGE BENNETT: She said these are the ones that she saw, that you showed her.

MR. MIDDLETON: Right. In my records I would like to know which ones they are, because further I have an objection to receipt of the documents on the grounds of hearsay.

JUDGE BENNETT: What you are saying is, if I follow you correctly, and correct me if I am in error, Respondent's Counsel is using different numbers from the ones you were using.

MR. MIDDLETON: And I would like to be able to cross-reference them first.

JUDGE BENNETT: Personally, I think you are wasting a lot of time.

I will give you about one minutes [*sic*] to do it.

MR. MIDDLETON: I am willing to do it after the—

JUDGE BENNETT: No, no. Do it now. I think you are wasting a lot of time, and I will repeat that.

Show her the original exhibits and ask her if those are the same ones. You can do it in 30 seconds.

MR. MIDDLETON: Your Honor, that's not what I am really seeking. I realize he has identified them as the same ones.

[144] I have got a General Counsel's 3. I don't know what that refers to in Respondent's exhibit or how Respondent's exhibit relates to my 3, which of those is which.

MR. MORSE: I am having trouble understanding why not. I have offered him copies of the exhibits and all he has to do is compare them, Your Honor.

JUDGE BENNETT: I couldn't agree with you more. I think he is wasting time.

MR. MIDDLETON: I have got the—

JUDGE BENNETT: Would you show her the exhibits?

MR. MIDDLETON: Would you tell me which exhibit General Counsel 3 is?

JUDGE BENNETT: And, incidentally, show her both. Don't confuse the witness.

MR. MIDDLETON: I only have the ones that I had marked, Your Honor. Those are the only ones that I have in my possession.

JUDGE BENNETT: And then show her Respondent's exhibits and let her choose or reject.

MR. MIDDLETON: Okay. If you would just match them up for me, I would appreciate it.

THE WITNESS: General Counsel's 3 is Respondent's 7.

General Counsel's 4(a), (b) and (c) is Respondent's 8(a), (b) and (c).

General Counsel's 5(a), (b) and (c) is Respondent's [145] 6(a), (b) and (c).

And General Counsel's 6(a), (b) and (c) is Respondent's 9(a), (b) and (c).

JUDGE BENNETT: I would assume that's a very definitive and responsive answer.

MR. MIDDLETON: Yes, I think so, Your Honor. Now, I am prepared to state my objections.

I object to the truth of the matter asserted in Respondent's 7.

JUDGE BENNETT: Coming back to the exhibits, you identified and offered it and I recieved it.

MR. MIDDLETON: No, I didn't offer them, Your Honor. I only identified them.

JUDGE BENNETT: Correct.

MR. MIDDLETON: I would object to the receipt of those on the grounds they are hearsay, with the exception of Responden.'s 8(a)—well, let me withdraw that.

Actually, I think I know what the answer is but I would ask to take the witness briefly on voir dire with respect to a couple of those.

JUDGE BENNETT: I will permit it.

* * * * *

[149] **DIRECT EXAMINATION (RESUMED)**

BY MR. MORSE:

Q. Ms. Price, let me show you what has been marked now as Respondent's Exhibits 10(a) and 10(b) and ask you if you can identify them for us, please?

A. Yes. This is a letter that Clint Waller sent to me informing me that he had notified the Teamsters that he no longer wanted to be a member.

Q. Would you please refer to the Exhibit by its number?

A. Okay. The letter to me from Clint Waller is 10(a). A copy of the letter that he sent to the Union is 10(b).

Q. Where did you receive 10(b), please?

A. Attached to 10(a).

Q. You received it in the mail?

A. Right.

MR. MORSE: Your Honor, at this time we have afforded Government Counsel a copy and we would offer Respondent's 10(a) and 10(b).

MR. MIDDLETON: I believe my objection is the same, Your Honor. Let me make sure I am looking at the same documents.

May I ask just a couple of questions on voir dire?

JUDGE BENNETT: Go ahead.

[150] **VOIR DIRE EXAMINATION**

BY MR. MIDDLETON:

Q. Are these documents – You say you received them through the mail; is that correct?

A. Right.

Q. Have they been maintained in your official business records since that date?

A. Yes, they have.

Q. The same records you testified to earlier?

A. Right.

MR. MIDDLETON: No objections, Your Honor.

JUDGE BENNETT: I will receive them.

(The documents referred to, having been previously marked for identification as Respondent's Exhibits 10(a) and 10(b) were received in evidence.)

DIRECT EXAMINATION (RESUMED)

BY MR. MORSE:

Q. What is the date, Ms. Price, stamped on Respondent's 10(a) indicating the date that your company received that letter?

A. We received it in our department on July 23rd.

JUDGE BENNETT: It came to your immediate attention?

[151] THE WITNESS: Yes.

BY MR. MORSE:

Q. May I ask you, please, whether or not you have had any previous conversations with Mr. Waller concerning what you have described as Respondent's 10(a)?

A. Yes, we did, over the phone. About a week prior to this he told us –

MR. MIDDLETON: Objection.

JUDGE BENNETT: Just a minute. Do you know his telephone voice?

THE WITNESS: Yes.

JUDGE BENNETT: You recognized it?

THE WITNESS: Yes.

JUDGE BENNETT: All right. I will take it.

A. (Continuing) He indicated that – He called to tell us that he had –

JUDGE BENNETT: This is Mr. Waller talking with you, or otherwise?

THE WITNESS: It was Mr. Waller talking to Jim Crocker.

JUDGE BENNETT: Well, how did you identify it was him?

THE WITNESS: I was informed of the conversation immediately after it.

MR. MIDDLETON: Objection, Your Honor.

JUDGE BENNETT: By Mr. Waller?

THE WITNESS: By Mr. Crocker.

[152] JUDGE BENNETT: Excuse me. Mr. Crocker.

MR. MIDDLETON: I would object again, Your Honor.

JUDGE BENNETT: We have the issue of Employer good-faith doubt.

I will receive it as evidence of what was reported to her.

BY MR. MORSE:

Q. When did you receive a report from Mr. Crocker [*sic*] he had had a telephone conversation with Mr. Waller?

A. Approximately one week prior to this letter.

JUDGE BENNETT: How long after the conversation, if you know?

THE WITNESS: Jim came immediately up to my office to let me know that Clint had called.

JUDGE BENNETT: That day?

THE WITNESS: Yes, sir.

BY MR. MORSE:

Q. What was the substance of his report to you?

A. He came to me to tell me that Clint had called to say that he had called the Union and told them he didn't want to be a member, and the reason Jim came immediately to my office was—

MR. MIDDLETON: Objection.

JUDGE BENNETT: Wait a minute. Don't tell us the reason. Tell us what he said, if anything.

[153] THE WITNESS: Okay. He came up and told me that Clint had called saying that he had called the Union and told them that he was withdrawing his membership from the Union.

JUDGE BENNETT: Then you got the letter?

THE WITNESS: And we got the letter about a week later.

BY MR. MORSE:

Q. Ms. Price, let me show you what has been marked as Respondent's Exhibit 11(a) and 11(b), please, and ask you if you can identify them?

A. Yes. No. 11(a) is a letter to Anna Jimenez who was one of our warehouse workers—

JUDGE BENNETT: Spell that for the Reporter, please.

THE WITNESS: J-i-m-e-n-e-z.

A. (Continuing) And 11(b) was an attachment that we sent to Anna Jimenez, along with my letter 11(a).

MR. MORSE: Your Honor, we offer Respondent's Exhibits 11(a) and (b).

MR. MIDDLETON: I want to see that.

MR. MORSE: It's in your folder.

JUDGE BENNETT: Your official title is Director, dash, Personnel?

THE WITNESS: It was then. We since changed the department name to Employee Relations, so it's Director of Employee Relations.

MR. MIDDLETON: With respect to 11(a), Your Honor, I [154] have no objection, but I do object with regard to 11(b).

JUDGE BENNETT: I will receive 11(a) and I will receive 11(b) as a form which the Employer sent to Anna Jimenez.

(The documents referred to, having been previously marked for identification as Respondent's Exhibits Nos. 11(a) and 11(b) were received in evidence.)

BY MR. MORSE:

Q. Ms. Price, I ask you, was Miss Jimenez employed at Curtin Matheson in the bargaining unit prior to the commencement of the strike in this case?

A. Yes, she was.

Q. And did you ever thereafter see her walking the picket line as the strike commenced?

A. We did a couple of—

MR. MIDDLETON: Objection.

JUDGE BENNETT: What is the question? Read it back, Mr. Reporter.

(The question was read.)

JUDGE BENNETT: I will take it.

A. (Continuing) We did on a couple of occasions at the beginning of the lockout.

[155] BY MR. MORSE:

Q. Thereafter, let me ask you, did you receive any report from employees as to what had become of Miss Jimenez?

A. Yes. I heard from a number of—

MR. MIDDLETON: Objection.

JUDGE BENNETT: She may answer.

A. (Continuing) I heard from a number of employees that Anna had found a job at the Post Office.

BY MR. MORSE:

Q. Can you tell us when you began to receive those reports, please?

A. It was approximately a week and a half to two weeks after the lockout had commenced.

Q. Can you tell me how you can pin point it at that time?

A. Well, for two reasons. I remember that she stopped appearing on the picket line. I noticed that. And secondly—

JUDGE BENNETT: You personally observed that?

THE WITNESS: Yes, sir. I was out there all of the time.

A. (Continuing) Secondly, I was surprised that she could get a job with the Post Office that quickly.

BY MR. MORSE:

Q. Let me show you what has been marked as Respondent's Exhibits 12(a) through 12(k), and ask you if you can identify [156] those for us, please?

A. Yes, 12(a) through 12(k) are letters of resignation from individuals who were members of the bargaining unit prior to the strike.

JUDGE BENNETT: You said resignation. May I see it?

The Board in some cases has made a distinction between resignation from a union shop contract and union membership.

I note that these talk about resigning employment.

If the General Counsel wishes to be heard, I will be glad to hear it.

MR. MIDDLETON: Your Honor—

JUDGE BENNETT: I think Texas is, if I am not mistaken, a right-to-work state.

MR. MORSE: That's correct.

MR. MIDDLETON: That's correct. I am just beginning to—this is 12. It seems that all of them have basically the same statement.

JUDGE BENNETT: Correct.

MR. MIDDLETON: I don't think it has any probative value, Your Honor, so far as the issue in this case is concerned because, one, there is no reference to the membership in the Union whatsoever by these statements, and, two, the resignation of employment does not per se indicate any hostility toward the Union.

[157] JUDGE BENNETT: This may be a stupid question, but if someone resigns employment how can they be a member of the union at that employer?

MR. MIDDLETON: He need not be one at that employer, but what I am saying the mere resignation from employment does not per se or ipso facto establish union animus on the part of that employee.

JUDGE BENNETT: Now, we are talking about good-faith doubt on the part of the Employer.

MR. MIDDLETON: Okay. In that case, under the Board law the replacements are presumed to support the union in the same ratio as did the former employees.

JUDGE BENNETT: Just by pure coincidence, and really I was reading a case from the Fifth Circuit coming down on the plane yesterday.

People's Gas System, Inc. versus NLRB, 104 LRRM 2224, decided May 2. My God, again my birthday.

They found an 8(a)(5) in the case, but they refused to issue a bargaining order.

Excuse me. I said the Fifth Circuit. It was a D.C. Circuit, which has plenary jurisdiction, but it was a case down in this District, what I would call the Fifth Circuit area, a Florida case.

MR. MIDDLETON: Of course, my position is, Your Honor, we are bound by the Board law, irrespective of the Circuit [158] decisions, do control in this matter.

JUDGE BENNETT: I quite agree with you.

One of my colleagues, now retired, said he wrote the Fifth Circuit rather than the Board, and in as much as I intend to retire at the end of this year I don't know where that leaves me, but you had an objection to the admission of R 12(a) through (k), was it?

MR. MIDDLETON: Through 12(k). That is one of my objections. Otherwise, I would like to take the witness on voir dire regarding each of those.

JUDGE BENNETT: All right. I will permit that.

VOIR DIRE EXAMINATION

BY MR. MIDDLETON:

Q. Are you familiar with the execution of Respondent's 12(a) through 12(k)?

A. I am.

Q. Were you present at the time they were executed?

A. I think I was on all of them.

Q. Well, let's do this, let's just take each one.

JUDGE BENNETT: Are you saying that the people who signed those signed them in your presence?

THE WITNESS: I think on all of them, yes, sir. I would have to look at the names.

MR. MORSE: If I may inject here, Your Honor, I think this is an entirely irrelevant inquiry.

[159] If they are business records, it doesn't matter whether or not the custodian of the business records has

personal knowledge so long as somebody in the Company had personal knowledge.

I just feel like it is a waste of time.

JUDGE BENNETT: I will permit a brief inquiry on this.

BY MR. MIDDLETON:

Q. Now, with respect to Respondent's 12(a), Mr. Shady Goodson, did you actually see Mr. Goodson execute this document on July 19th?

A. I did.

Q. Where were you at that time?

A. Jim Crocker's office.

Q. Who was present?

A. Jim Crocker, myself and Shady.

JUDGE BENNETT: The General Counsel is running the risk of verifying all of this. I assume you are aware of that.

MR. MIDDLETON: That's correct. Let me say I don't necessarily agree that this verifies this. At least it helps to show the circumstances surrounding the–

JUDGE BENNETT: She is testifying she saw the man sign it in front of her.

MR. MIDDLETON: Well, this is true.

JUDGE BENNETT: All right. Next question.

[160] BY MR. MIDDLETON:

Q. Now, I notice from reviewing these documents just briefly here that they are all apparently prepared on the same typewriter.

A. That's correct.

Q. Do you know whose typewriter that was?

A. It was one in our department.

Q. Do you know who did the actual typing?

A. One of the secretaries.

Q. It also appears that each of those documents were signed with the same type of pen. As a matter of fact, the very same pen?

A. I doubt that seriously.

Q. Were these documents prepared by the Employer for employees other than those employees included in Respondent's 12(a) through 12(k)?

A. Your question is what?

Q. Were similar documents prepared for employees in the bargaining unit other than those included in 12(a) through 12(k)?

A. I do not think so.

Q. Why were these prepared – First of all, were these all prepared at the same time?

A. No, they were not.

Q. Were you present when each one of them was prepared?

[161] A. Do you mean typed?

Q. Yes.

A. I can't say that I was.

Q. So, you don't really know of your own knowledge when the documents themselves were actually prepared; is that true?

A. I do not know when they were typed.

Q. That's what I mean.

JUDGE BENNETT: You saw them signed?

THE WITNESS: Most of them, yes. I don't know exactly who is in here.

BY MR. MIDDLETON:

Q. Let's do this: You said you saw Mr. Shady Goodson?

A. Yes.

Q. Did you see Robbie Madison?

A. Yes.

Q. Did you see Wilfred Green?

A. Yes.

Q. Did you see John Thompson?

A. Yes.

Q. Joanne Stephens?

A. Yes.

Q. Joe Doby?

A. Yes.

Q. J. R. Blackshire?

A. Yes.

[162] Q. Pete Doucette?

A. Yes.

Q. Anna Jimenez?

A. No.

Q. Clint Waller?

A. I can't remember if I was there when he signed this or not.

Q. How about Pablo Sanchez?

A. No, I did not.

JUDGE BENNETT: With respect to the few that you did not see signed, how did they come to your attention?

THE WITNESS: Anna Jimenez mailed her's [*sic*] in. Clint Waller, I can't remember because I saw him on two or three occasions, and I don't know if this was one of them, and on Pablo Sanchez, I think I was out of town that day and my manager of compensation handled that.

JUDGE BENNETT: As far as the others are concerned you personally saw them?

THE WITNESS: Yes, sir.

MR. MORSE: May I ask a couple of more questions, Your Honor?

JUDGE BENNETT. Go ahead.

DIRECT EXAMINATION (RESUMED)

BY MR. MORSE:

Q. Ms. Price, with respect to what has been marked as [163] as Respondent's Exhibits 12(a) through 12(k), can you state whether or not these documents were made in the ordinary course of business at Curtin Matheson?

A. They were.

Q. Were they made at or near the time of the events depicted there?

A. Yes, they were.

Q. Based on personal knowledge of either yourself or another employee at Curtin Matheson?

A. Yes.

Q. And have they been maintained as part of the business records of the Company since that day?

A. Yes.

Q. Are you the custodian of such records?

A. Yes.

MR. MORSE: We offer Respondent's Exhibits 12(a) through 12(k) again, Your Honor.

MR. MIDDLETON: Objection, Your Honor.

JUDGE BENNETT: I will receive them.

(The documents referred to, having been previously marked for identification as Respondent's Exhibits 12(a) through 12(k) were received in evidence.)

[164] BY MR. MORSE:

Q. Ms. Price, you testified earlier in your remarks to us today about visiting with some of the replacement employees hired at the Company after the lockout was over.

A. Yes.

Q. And you also testified that you had conversation with, among others, a Mr. David Schneider; is that correct?

A. Yes.

Q. Let me show you what has been marked as Respondent's Exhibit 13(a) through 13(f) and ask you if you can identify that for us, please?

A. These are some handwritten notes I took regarding the conversations I had with those employees.

Q. Do the notes relating to your conversation with David Schneider appear on Respondent's Exhibit 13?

A. Yes, 13(e).

Q. Were those notes taken at the time—were those notes made at the time when your recollection of exactly what was said by Mr. Schneider was fresh in your mind?

A. Yes. Normally I talk with the employee and then immediately turn around and walk down an aisle and write the note out.

Q. I take it from your general remarks this morning you can generally recall what he testified to; is that right?

A. Yes.

[165] Q. Specifically, though, as to exactly what he said would Respondent's Exhibit 13 be the most accurate information of that?

A. Yes.

MR. MIDDLETON: Objection.

JUDGE BENNETT: Wait a minute. The answer may be stricken.

Do you have an objection?

MR. MIDDLETON: Yes, sir, leading.

MR. MORSE: Your Honor, I believe I am permitted to lead in order to establish a predicate for the admission into evidence.

I thought we could get it in, but if we are going to have to go through the technical aspects of—

JUDGE BENNETT: I will permit it.

Will you state your question again.

BY MR. MORSE:

Q. Let me ask you this: You testified earlier that you generally recall what Mr. Schneider told you; is that correct?

A. Right.

Q. Would your notes, as reflected on Respondent's Exhibit 14, made shortly after the conversation in question, reflect exactly what was said at that time?

A. Exhibit 13, yes.

[166] MR. MORSE: Thank you. We offer those.

MR. MIDDLETON: Objection, again, Your Honor, hearsay, irrelevant and immaterial.

JUDGE BENNETT: I will receive them.

(The documents referred to. [*sic*] having been previously marked for identification as Respondent's Exhibits 13(a) through 13(f) were received in evidence.)

BY MR. MORSE:

Q. Let me show you now what has been marked Respondent's Exhibit 14, and ask you if you can identify that?

JUDGE BENNETT: Let me ask you this: Do you have many more of these?

MR. MORSE: Your Honor, I have three more.

JUDGE BENNETT: All right. I will be patient.

MR. MORSE: I am trying to hurry.

JUDGE BENNETT: You are showing her R14?

MR. MORSE: Yes.

BY MR. MORSE:

Q. Can you identify that for us, please?

A. It's a request from Shady Goodson for unconditional reinstatement to his job at CMS.

Q. Was that signed in your presence?

[167] A. Yes, it was.

Q. It has been a part of the business records of the Company?

A. Yes.

MR. MORSE: I offer Respondent's Exhibit 14, Your Honor.

JUDGE BENNETT: Let me see it.

He signed this in your presence?

THE WITNESS: Yes, he did.

JUDGE BENNETT: What were the circumstances of it?

THE WITNESS: He came into Jim Crocker's office and I was already there, and indicated that he wanted to come back to work at CMS. He signed that in front of us, and we gave him a copy of it.

JUDGE BENNETT: I will receive it.

(The document referred to, having been previously marked for identification as Respondent's Exhibit 14 was received in evidence.)

BY MR. MORSE:

Q. For clarification of the record, Ms. Price, were documents similar to what has been offered and received as Respondent's 14 extended to and signed by all returning strikers who requested reinstatement?

[168] MR. MIDDLETON: Objection.

JUDGE BENNETT: There is an objection. How many strikers are we talking about?

MR. MORSE: The ones that come back and requested reinstatement.

JUDGE BENNETT: I said how many, if you know?

MR. MORSE: Your Honor, I am going to say roughly 20.

JUDGE BENNETT: Do you know how many?

THE WITNESS: How many returning strikers or how many—

MR. MORSE: Returning strikers requesting reinstatement. Let me withdraw the question, Your Honor.

JUDGE BENNETT: Go ahead.

BY MR. MORSE:

Q. What was the practice of the Company, Ms. Price, if an employee who had been on strike during this period we have been discussing, came to the Company and said, "I would like at this time to be reinstated"?

A. We would give them the original of this document.

JUDGE BENNETT: Are you talking about R 14?

THE WITNESS: Yes, sir.

A. (Continuing) And ask them to sign it in my presence and either Jim Crocker or Tim Martin's presence.

I would then sign it and we would make a copy of it for the employee, give it to him.

We would then go through the computer run with him to [169] make sure we had his most recent address and most recent phone number.

BY MR. MORSE:

Q. Let me show you what has been marked as Respondent's Exhibit 15(a) and 15(b) and ask you if you can identify that, please?

A. Yes. These are organizational charts that are prepared in my department at the end of each month.

Exhibit 15(a) is for the International Division as of May 31, '79, and 15(b) is for the Houston branch as of May 31, '79.

Q. For the benefit of the Court, would you please tell us whether or not you can tell from Respondent's Exhibit 15(a) and (b) how many employees there were in the bargaining unit and on the Company's payroll as of May 31, 1979?

A. Yes. You can look under the warehouse section and see in the International Division that there were four people. The lead man, Shady Goodson, Steele, Jones and Waller, and in the Houston branch, under the warehouse, there were 23 people, for a total of 27.

Q. I take it from your testimony previously that the Company commenced the lockout of the employees as of June 1st, 1979; is that correct?

A. That is correct.

Q. And thereafter the lockout was terminated on June 12th, [170] 1979; is that correct?

A. Yes.

Q. Was the Union picketing the Company during the period of the lockout?

A. Yes.

Q. Did the Union continue to picket the Company subsequent to the lockout's termination?

A. Yes.

Q. Do you recall when you received official notice from the Union that they were terminating the strike?

A. It was July 16, in their telegram.

Q. Let me show you what has been marked as . . .

MR. MORSE: Pardon me, Your Honor. If I haven't offered it, I now offer Respondent's Exhibit 15(a) and (b).

MR. MIDDLETON: I don't have any objection, Your Honor.

JUDGE BENNETT: I will receive it.

(The documents referred to, having been previously marked for identification as Respondent's Exhibits 15(a) and 15(b) were received in evidence.)

[175] BY MR. MORSE:

Q. Ms. Price, can you tell us whether or not the employees you hired to replace the striking employees were considered permanent replacements with the Company?

A. Yes, they were and they were told that.

MR. MORSE: Pass the witness, Your Honor.

CROSS-EXAMINATION

BY MR. MIDDLETON:

Q. In response to your Counsel's last question, did you interview each of those replacements personally?

A. Yes, I did.

Q. And when you say they were considered as permanent replacements, whose consideration are you referring to?

A. Well, the Company's consideration.

Q. What is your testimony that they were considered permanent replacements based upon?

A. Because they were permanent replacements, and we told them that.

JUDGE BENNETT: You say they were told that?

THE WITNESS: Yes, they were.

JUDGE BENNETT: By you?

THE WITNESS: Yes.

* * * * *

[231] JIM CROCKER

having been first duly sworn, was called as a witness herein and was examined and testified as follows:

JUDGE BENNETT: State your name and address for the record.

THE WITNESS: My name is Jim Crocker. My address is 9806 Halliford, Houston, Texas.

JUDGE BENNETT: Jim Crocker?

THE WITNESS: Yes, sir.

DIRECT EXAMINATION

BY MR. MORSE:

Q. Mr. Crocker, how are you employed?

A. I am employed by Curtin Matheson Scientific as the Operations Manager of the International Division.

Q. I will ask you to direct your attention to June 19 of [232] 1979, and ask you how you were employed, please?

A. I was employed as the same, Operations Manager of the International Division.

Q. Directing your attention to that day, may I ask you whether you had an occasion to have any conversation with Mr. Shady Goodson on that date?

A. Yes, sir, I did have.

Q. Could you tell us, the circumstances under which that conversation occurred?

A. Yes. Shady had talked with our Sales Manager of International on the phone several times.

JUDGE BENNETT: Let's talk about you and Shady.

THE WITNESS: All right. Shady came in to the office and met with Ms. Price, our Personnel Director and myself, in a meeting which he asked for, and at that time we just more or less let Shady do his talking.

MR. MIDDLETON: I'm going to—

BY MR. MORSE:

Q. May I ask you, please, to tell us—

JUDGE BENNETT: Just a moment. We may have an objection.

MR. MIDDLETON: As to what he had asked for, Your Honor. I move to strike it. There is no evidence in the record to show this witness is competent to testify to that.

I think it assumes a fact not in evidence.

[233] JUDGE BENNETT: I will overrule it.

BY MR. MORSE:

Q. Mr. Crocker, could I ask you to search your recollection and testify, as best you can, as to exactly what Mr. Goodson told you and Ms. Price during this meeting?

A. Yes. Shady opened up the conversation by saying that he was there on his own, and he did not represent the people in the Union nor the Union itself.

Shady further stated that he was more or less frustrated with the whole situation, he was getting very little support from the Union.

He was having to put together the people that formed the strike line. He was not getting much support on that.

He was having to use the same people over and over, and that he felt like it was more or less—I will put this in his exact words, if I can.

He didn't feel like he was getting anything for his membership dues.

JUDGE BENNETT: Now, you were there and Shady was there?

THE WITNESS: And Ms. Price was there.

JUDGE BENNETT: The three of you?
THE WITNESS: That's correct.
JUDGE BENNETT: All right.
A. (Continuing) He further went on to say that he did [234] not feel like the membership was behind this strike, and that it was more a vendetta type thing on Howard's part than what it was to membership. He felt like it should have been over with a long time ago.
BY MR. MORSE:
Q. May I ask you, please, when he said the word "Howard," to whom did you understand him to refer?
A. The business agent.
MR. MIDDLETON: Objection.
JUDGE BENNETT: Overruled.
A. (Continuing) He understood that—I understood that to be the business agent for the Union, Mr. Howard Reed.
BY MR. MORSE:
Q. Can you tell us whether or not you recall Mr. Goodson specifically saying anything else in the meeting?
A. He mentioned . . . .
Q. Is that basically what you recall?
A. That's basically it.
Q. After the meeting, could I ask you whether or not you and Ms. Price had occasion to prepare a memorandum of exactly what was said?
A. We did sit down at my desk and take some notes covering the conversation.
Q. Let me show you what has been marked as Respondent's 7, and ask you if you can identify that, please?
[235] A. Yes. This is the note we took.
MR. MORSE: Pass the witness.
JUDGE BENNETT: May I see that?
Excuse me. I have to get out my other glasses.
Do you know who wrote this?

THE WITNESS: Yes, I do. Ms. Price wrote that.
JUDGE BENNETT: In your presence?
THE WITNESS: In my presence.
JUDGE BENNETT: Did you read it?
THE WITNESS: Yes, sir. At the time, I certainly did.
JUDGE BENNETT: All right. Next question.

CROSS-EXAMINATION

BY MR. MIDDLETON:
Q. How long did this meeting last, Mr. Crocker, where you met with Mr. Goodson in the presence of Ms. Price?
A. I would say approximately 30 minutes.
Q. Who did the talking during that meeting?
A. Shady did almost all of it.
JUDGE BENNETT: When you say Shady—
THE WITNESS: Mr. Goodson.
BY MR. MIDDLETON:
Q. Did you do any talking during that meeting?
A. I exchanged cordials with him at the outset of the meeting.
Q. What do you mean by that?
[236] A. Hello, how are you, this type of thing.
Q. Is that the only thing you uttered during that meeting?
A. I don't recall anything. At the end of it I wished him luck.
JUDGE BENNETT: How did you happen to do that?
THE WITNESS: You know, "It's nice to see you again," this type of thing.
BY MR. MIDDLETON:
Q. Except for your greetings and your goodbye, you had no comments to him during that meeting; is that your testimony?

A. Yes, sir. There was very little said on our part whatsoever.

Q. Did Ms. Price have anything to say to him during that meeting?

A. Very, very little.

Q. Do you recall her saying anything to him during that meeting?

A. More or less. I guess, "Why are we here," this type of thing.

Q. Well, can you recall that she actually asked, "Why are we here"?

A. No, I can't recall the exact words, no.

Q. Do you remember her saying anything, in fact, during that meeting?

[237] A. Not that I could testify on, no.

Q. So, all you can testify to is that Mr. Goodson did all of the talking and you and Ms. Price listened, except for the greetings and the goodbye?

A. Basically, yes, that's correct.

Q. When you say, "Basically," are you telling me there were some other things that were actually said that you are not telling us about by you or by Ms. Price?

A. I will tell you very precisely what I remember, and I don't recall anything else.

JUDGE BENNETT: You do precisely that, whatever you can remember.

BY MR. MIDDLETON:

Q. Did you understand the Judge?

A. Yes, sir, certainly.

Q. Now, would you go ahead and tell us what you remember?

A. I really don't remember anything. I don't remember the specifics.

JUDGE BENNETT: Are you saying you don't remember anything other than what you have already testified to us?

THE WITNESS: That's correct.

JUDGE BENNETT: All right. Next question.

BY MR. MIDDLETON:

Q. If I understood your testimony you say that you read Respondent's Exhibit 7 after it was prepared; is that correct?

[238] A. Yes, sir. At the time it was prepared I did go over it with her.

Q. Did you read each line, I mean each sentence in the statement after it was prepared?

A. We went over it very thoroughly back when it was prepared.

Q. In other words, you read it in its entirety; is that right?

A. Yes, sir.

Q. At that time?

A. Yes, sir.

Q. Do you understand shorthand?

A. No, I do not understand shorthand.

Q. Was there any shorthand contained in that document, that you recall?

A. No, sir.

Q. There was or there wasn't?

A. The notes that we put together at that time, I don't recall.

Q. It could have had shorthand in it but you don't recall it?

A. I don't recall seeing any shorthand.

Q. Do you actualy recall reading that document in its entirety?

A. Yes, I do.

[239] Q. Do you recall when you read it in its entirety there were no shorthand notes in there?

A. I don't recall seeing shorthand. If there was some—I am not saying there was not—I am saying I don't recall it.

Q. Let me ask you to take a look at the document here, and I am directing your attention to the second paragraph beginning with the word "Finally," and ask you if the last phrases in that sentence which are in shorthand mean anything to you?

A. No, sir, they do not.

Q. Do you recall them being in there at the time you read the document?

A. No, sir, I do not.

Q. I direct your attention to—

JUDGE BENNETT: You did read the document?

THE WITNESS: Yes, we did go over it.

BY MR. MIDDLETON:

Q. Let me direct your attention now to the second sentence beginning with the letters capital S, capital G, which reads, "SG did all of the talking. He wanted his," and then follows a shorthand phrase.

Does that phrase mean anything to you?

A. No, sir. When we went over this, we went over it verbatim, and Elizabeth would read it back to me and she'd [240] say, "Is that exactly what happened," and I would say, "Yes."

Q. You did read it, then?

A. Yes, I did read it.

Q. Do you recall having seen that shorthand phrase in there at the time you read it?

A. No, sir, I don't.

Q. Did you take any notes of your own at that time?

A. No, sir.

Q. So the only notes that were made were those of Ms. Price; is that correct?

A. That's correct.

MR. MIDDLETON: I pass the witness, Your Honor.

MR. MORSE: Nothing further.

JUDGE BENNETT: You are excused.

MR. MIDDLETON: Excuse me, Your Honor. I am sorry. There are a couple of other questions. May I please go through them very briefly?

JUDGE BENNETT: Go ahead.

BY MR. MIDDLETON:

Q. Mr. Crocker, how long have you been employed at the *Curtis* Matheson Scientific, Inc. firm?

MR. MORSE: Pardon me. Your Honor, I am going to object to the mispronounciation of my client's name. It is Curtin Matheson Scientific.

MR. MIDDLETON: My apologies. It wasn't intentional.

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

CHARGE AGAINST EMPLOYER

INSTRUCTIONS: File an original and 4 copies of this charge with NLRB regional director for the region in which the alleged unfair labor practice occurred or is occurring.

DO NOT WRITE IN THIS SPACE

Case No. 23-CA-7620

Date Filed July 30, 1979

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

a. Name of Employer: CURTIN MATHESON SCIENTIFIC, INC.

b. Number of Workers Employed: 23

c. Address of Establishment (Street and number, city, State, and ZIP code): P.O. Box 1546
4220 Jefferson Avenue, Houston, TX 77001

d. Employer Representative to Contact: Ms. Elizabeth Price

e. Phone No.: 923 1661

f. Type of Establishment (Factory, mine, wholesaler, etc.): wholesaler

g. Identify Principal Product or Service: Chemical products & supplies

h. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and (5) (List subsections) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the Act.

2. Basis of the Charge (Be specific as to facts, names, addresses, plants involved, dates, places, etc.)

Since on or about July 15, 1979, and at all times thereafter, Curtin Matheson Scientific, Inc., by its officers, agents, and representatives, has refused to bargain collectively with General Drivers, Warehousemen and Helpers Local Union No. 968, a labor organization chosen by a majority of its employees in an appropriate unit, for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment and other terms and conditions of employment, by failing to reduce a negotiated collective bargaining agreement to writing and executing the same and by failing to supply said labor organization with certain requested data, necessary and relevant to its performance as bargaining agent.

By the above and other acts, the above-named employer has interfered with, restrained, and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act.

3. Full Name of Party Filing Charge (If labor organization, give full name, including local name and number)
General Drivers, Warehousemen and Helpers Local Union No. 968

4a. Address (Street and number, city, State, and ZIP code): 3100 Katy Freeway, Houston, Texas 77007

4b. Telephone: 8697133

5. Full Name of National or International Labor Organization of Which It Is an Affiliate or Constituent Unit (To be filled in when charge is filed by a labor organization) International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America

6. DECLARATION

I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

By _____ Business Representative
(Signature of representative or person filing charge) (Title, if any)
HOWARD REED

Address 3100 Katy Freeway, Houston, TX 77002 869 7133 7/30/79
(Telephone number) (Date)

WILFULLY FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

APPENDIX 'A'

APPENDIX 'B'

112

713/226-4271

July 30, 1979

Curtin Matheson Scientific, Inc.
Attn: Ms. Elizabeth Price
P.O. Box 1546
4220 Jefferson Avenue
Houston, Texas 77001

Re: Curtin Matheson Scientific, Inc.
Case No. 23-CA-7620

113

Gentlemen:

A charge has been filed with this office alleging that you have engaged and are engaging in unfair labor practices within the meaning of the National Labor Relations Act, as amended. A copy of the charge is herewith served upon you. Also enclosed is a copy of Form NLRB-4541, pertaining to our investigative and voluntary adjustment procedures.

Attention is called to your right, and the right of any party, to be represented by counsel or other representative in any proceeding before the National Labor Relations Board and the Courts. In the event you choose to have a representative appear on your behalf, please have your representative complete "Notice of Appearance" Form NLRB-4701 and forward it promptly to this office. Also enclosed is Form NLRB-4813, which you may file should you wish to designate a representative as your agent to receive exclusive service of all documents and written communications relating to this proceeding. Please note that this form must be signed by the party and not by an attorney or other representative designated to represent you in this proceeding (see the second paragraph of the enclosed Notice to Parties, Form NLRB-4541).

You are requested to submit promptly a complete written account of the facts and a statement of your position in respect to the allegations set forth in the charge. All communications and submissions should be made to the Board Agent indicated below.

Your cooperation with this office is invited so that all facts of the case may be considered.

Very truly yours,

Enclosures 205004
REGISTERED MAIL
RETURN RECEIPT REQUESTED

Arthur Safos
Acting Regional Director

Case assigned to:	Agent's Telephone Number
Bernard Middleton, Attorney	713/226-4287

cc: Andrews, Kurth, Campbell & Jones, 2500 Exxon Bldg., Houston, Texas 77002
General Drivers, Warehousemen and Helpers Local Union No. 968, Attn: Howard Reed, Bus. Repr., 3100 Katy Frwy., Houston, Texas 77007
Eric H. Nelson, Attorney, 620 One Allen Center, 500 Dallas, Houston, Tx. 77002

I certify that I served the above referred to charge this day by postpaid registered mail on the addressee named above, together with a transmittal letter of which this is a true copy.

Patricia K. Johnson

Subscribed and sworn to before me this 30th day of July 1979

Jean Tancalf

APPENDIX 'B'

APPENDIX C

UNITED STATES OF AMERICA
BEFORE
THE NATIONAL LABOR RELATIONS BOARD
REGION TWENTY-THREE

CURTIN MATHESON SCIENTIFIC, INC.

and Case 23-CA-7620

GENERAL DRIVERS, WAREHOUSEMEN & HELPERS, LOCAL 968, AFFILIATED WITH INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA

COMPLAINT

It having been charged by General Drivers, Warehousemen & Helpers, Local 968, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, herein called the Union, that Curtin Matheson Scientific, Inc., herein called Respondent, has engaged in, and is engaging in, certain unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, as amended, 29 U.S.C., Sec. 151, *et seq.*, herein called the Act, the General Counsel of the National Labor Relations Board, herein called the Board, on behalf of the Board, by the Regional Director for Region Twenty-three, pursuant to Section 10(b) of the Act, and Section 102.15 of the Board's Rules and Regulations, Series 8, as amended, hereby issues this Complaint and alleges as follows:

1.

The charge herein, filed by the Union, was duly served upon Respondent by registered mail on July 30, 1979.

2.

Respondent is a Delaware corporation, with its principal office and place of business located in Houston, Texas, where it is engaged in the business of buying and selling of laboratory instruments and supplies.

3.

During the past twelve months, a representative period, Respondent, in the course and conduct of its business operations, purchased and received goods and materials valued in excess of $50,000, which goods and materials were shipped to Respondent's facilities in Texas directly from points outside the State of Texas.

4.

Respondent is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

5.

The Union is now, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

6.

At all times material herein, the following-named person occupied the position set opposite her name and has been, and is now, a supervisor of Respondent, within the meaning of Section 2(11) of the Act, and an agent of Respondent, acting on its behalf, within the meaning of Section 2(13) of the Act:

Elizabeth Price – Director of Personnel

7.

At all times material herein, the following-named person occupied the position set opposite his name and has been, and is now, an agent of the Union, acting on its behalf, within the meaning of Section 2(13) of the Act:

Howard Reed—Business Representative

8.

The following employees of Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All production and maintenance employees, including truck drivers and city sales employed at 4220 Jefferson, Houston, Texas, excluding all other employees including office clerical employees, service repairmen, telephone sales, outside salesmen, guards, watchmen, laboratory personnel, and supervisors as defined in the Act.

9.

On April 15, 1970, the Union was certified as the exclusive collective bargaining representative of the employees in the unit described above in paragraph 8.

10.

At all times since April 15, 1970, the Union, by virtue of Section 9(a) of the Act, has been, and is, the exclusive representative of the employees in the unit described above in paragraph 8 for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment and other terms and conditions of employment.

11.

On or about May 2, 1979, the Union and Respondent commenced negotiations for a new collective bargaining agreement.

12.

On or about May 25, 1979, Respondent made its last and best offer to the Union.

13.

On or about July 16, 1979, the Union notified Respondent that the unit employees had voted to accept Respondent's last and best offer of May 25, 1979, which constituted a full and complete agreement with respect to terms and conditions of employment of the employees in the unit described above in paragraph 8 to be incorporated in a collective bargaining agreement between the Union and Respondent.

14.

Since on or about July 19, 1979, the Union has requested Respondent to execute a written contract embodying the agreement described above in paragraph 13.

15.

Since on or about July 20, 1979, Respondent, by telegram from its Director of Personnel to the Union, has failed and refused to execute a written contract embodying the agreement described above in paragraph 13.

16.

On or about July 20, 1979, Respondent, by telegram from its Director of Personnel, withdrew its recognition of

the Union as the exclusive collective bargaining representative of its employees in the unit described above in paragraph 8.

17.

Since on or about July 20, 1979, the Union, by letter of its Business Representative Howard Reed, has requested Respondent to furnish the following information:

1. The total number of bargaining unit employees currently on its payroll.
2. The job classification of each bargaining unit employee currently on its payroll.
3. The seniority date of each bargaining unit employee currently on its payroll.

18.

The information requested by the Union as described above in paragraph 17 is necessary for, and relevant to, the Union's performance of its function as the exclusive collective bargaining representative of the employees in the unit described above in paragraph 8.

19.

Since on or about July 20, 1979, Respondent has failed and refused to furnish the Union the information requested by it, as described above in paragraphs 17 and 18.

20.

By the acts and conduct described above in paragraphs 15, 16 and 19, and by each of said acts, Respondent has failed and refused, and is failing and refusing, to bargain collectively with the representative of its employees, and Respondent thereby has engaged in, and is engaging in,

unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

YOU ARE HEREBY NOTIFIED that, pursuant to Section 102.20 and 102.21 of the Board's Rules and Regulations, Series 8, as amended, Respondent shall file with the Regional Director, acting in this matter as agent of the National Labor Relations Board, an original and four (4) copies of an Answer to said Complaint within ten (10) days from the service thereof and that, unless it does so, all of the allegations in the Complaint shall be deemed to be admitted to be true, and may be so found by the Board. Immediately upon the filing of its Answer, Respondent shall serve a copy thereof on each of the other parties.

Dated at Houston, Texas, this 7th day of September, 1979.

/s/ Louis V. Baldovin, Jr.

LOUIS V. BALDOVIN, JR., Regional Director
National Labor Relations Board
Region Twenty-three
One Allen Center, Suite 920
500 Dallas Avenue
Houston, Texas 77002

APPENDIX D

UNITED STATES OF AMERICA
BEFORE
THE NATIONAL LABOR RELATIONS BOARD

CURTIN MATHESON SCIENTIFIC, INC.

and Case 23-CA-7620

GENERAL DRIVERS, WAREHOUSEMEN & HELPERS, LOCAL 968, AFFILIATED WITH INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA

AFFIDAVIT OF SERVICE OF COMPLAINT

DATE OF MAILING September 7, 1979

I, the undersigned employee of the National Labor Relations Board, being duly sworn, depose and say that on the date indicated above I served the above-entitled document(s) by post-paid registered mail upon the following persons, addressed to them at the following addresses:

James V. Carroll, III, Esq.
Andrews, Kurth, Campbell & Jones
2500 Exxon Building
Houston, Texas 77002
REGISTERED NO. 205133

Eric H. Nelson, Esq.
One Allen Center, Suite 620
500 Dallas Avenue
Houston, Texas 77002
REGISTERED NO. 205134

REGULAR MAIL

Curtin Matheson Scientific, Inc.
Attention: Elizabeth Price, Director of Personnel
4220 Jefferson Avenue
Houston, Texas 77001

General Drivers, Warehousemen & Helpers, Local 968, Affiliated With International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America
Attention: Howard Reed, Business Representative
3100 Katy Freeway
Houston, Texas 77002

/s/ Patsy C. Gray

Subscribed and sworn to before me
this 7th day of September, 1979
/s/ Fran Tansall

Designated Agent.
NATIONAL LABOR RELATIONS BOARD

APPENDIX E

UNITED STATES OF AMERICA
BEFORE
THE NATIONAL LABOR RELATIONS BOARD
REGION TWENTY-THREE

CURTIN MATHESON SCIENTIFIC, INC.

and Case No. 23-CA-7620

GENERAL DRIVERS, WAREHOUSEMEN & HELPERS, LOCAL 968, AFFILIATED WITH INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA

ANSWER

In response to the allegations contained in the Complaint filed upon Curtin Matheson Scientific, Inc. ("Curtin Matheson") herein, Curtin Matheson would respectfully respond as follows:

I.

The allegations contained in paragraphs 1, 2, 3, 7, 9, 11, 17 and 19 are admitted.

II.

The allegations contained in paragraphs 4, 5, 8, 10, 14, 18, and 20 are denied.

III.

The allegations contained in paragraph 6 are admitted, except that the title of Elizabeth Price recently changed from "Director of Personnel" to "Director of Employee Relations."

IV.

Regarding the allegations contained in paragraph 12, Curtin Matheson admits that on or about May 25, 1979, it made its last offer to the union. However, Curtin Matheson can only speculate as to the basis upon which its last offer might be characterized as "best," because such a characterization would depend on the relative valued [*sic*] placed on the different language and economic proposals that were contained in Curtin Matheson's various offers. Accordingly, Curtin Matheson does not have sufficient information upon which to respond to such allegation.

V.

Regarding the allegation contained in paragraph 13, Curtin Matheson admits that on or about July 16, 1979, the union sent a telegram to Curtin Matheson that purported to accept Curtin Matheson's May 25, 1979 offer. The language of the telegram differs from the characterization of the telegram contained in paragraph 13, and the telegram itself is the best evidence of its content. Therefore, except as admitted above, Curtin Matheson denies the allegations contained in paragraph 13.

VI.

Regarding the allegations contained in paragraph 15, Curtin Matheson admits that on or about July 20, 1979, Curtin Matheson notified the union that its offer of May 25, 1979 was not available for acceptance by the union, in terms and for the reasons set forth in the written communication, which is the best evidence of its contents. Except as admitted herein, Curtin Matheson denies the allegations contained in paragraph 15.

VII.

Regarding the allegations contained in paragraph 16, Curtin Matheson admits that on or about July 20, 1979, it notified the union that it declined to recognize and/or bargain with the union, in terms and for the reasons set forth in the written communication, which is the best evidence of its content. Except as admitted herein, Curtin Matheson denies the allegations contained in paragraph 16.

VIII.

Regarding the allegations contained in paragraph 19, Curtin Matheson admits that following its receipt of the letter referred to in paragraph 17, Curtin Matheson failed and refused to furnish the union with the information requested therein. Except as admitted herein, Curtin Matheson denies the allegations contained in paragraph 19.

WHEREFORE, PREMISES CONSIDERED, Curtin Matheson Scientific, Inc. prays that the National Labor Relations Board's Complaint be dismissed and held for naught.

Respectfully submitted,

/s/ James V. Carroll, III

JAMES V. CARROLL, III
2500 Exxon Building
Houston, Texas 77002
(713) 652-2522

ATTORNEY FOR CURTIN MATHESON SCIENTIFIC, INC.

OF COUNSEL:
Andrews, Kurth, Campbell & Jones

CERTIFICATE OF SERVICE

The undersigned does hereby certify that a true and correct copy of the foregoing Answer of Curtin Matheson Scientific, Inc. was served upon Local 968 by the mailing thereof, certified mail, return receipt requested, on the 18th day of September, 1979.

/s/ James V. Carroll, III

JAMES V. CARROLL, III

APPENDIX F

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

CURTIN [*sic*] SCIENTIFIC COMPANY, EMPLOYER

and Case No. 23-EC-3404

GENERAL DRIVERS, WAREHOUSEMEN & HELPERS, LOCAL NO. 968, A/W INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, PETITIONER

TYPE OF ELECTION – Stipulation

CERTIFICATION OF REPRESENTATIVE

An election having been conducted in the above matter under the supervision of the Regional Director of the National Labor Relations Board in accordance with the Rules and Regulations of the Board; and it appearing from the Tally of Ballots that a collective bargaining representative has been selected; and no objections having been filed to the Tally of Ballots furnished to the parties, or to the conduct of the election, within the time provided therefor;

Pursuant to authority vested in the undersigned by the National Labor Relations Board, IT IS HEREBY CERTIFIED that GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS LOCAL NO. 968, a/w INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA has been designated and selected by a majority of the employees of the above-named Employer, in

the unit described below, as their representative for the purposes of collective bargaining, and that, pursuant to Section 9(a) of the Act as amended, the said organization is the exclusive representative of all the employees in such unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other conditions of employment.

UNIT: INCLUDED: All production and maintenance employees, including truck drivers and city sales employed at 4220 Jefferson, Houston, Texas.

EXCLUDED: All other employees including office clerical employees, service repairmen, telephone sales, outside salesmen, guards, watchman, laboratory personnel, and supervisors as defined in the Act.

Signed at Houston, Texas
On the 15th day of April, 1970.

[SEAL]

On behalf of
NATIONAL LABOR RELATIONS BOARD

/s/ Clifford W. Potter
Regional Director, Region 23
National Labor Relations Board

APPENDIX G

WESTERN UNION MAILGRAM

4-012598E197002 07/16/79 ICS IPMBNGZ CSP HOUB
1 7138697133 MGM TDBN HOUSTON TX 07-16
1001A EST

HOUSTON TEAMSTERS LOCAL 968 DK
3100 KATY FRWY
HOUSTON TX 77007

This Mailgram is a confirmation copy of the following message:

7138697133 TDBN Houston TX 60 07-16 1001A EST
PMS Elizabeth Price, Personnel Manager

Curtain [*sic*] -Matheson Scientific, DLR, Report delivery by Mailgram, DLR
4220 Jefferson Ave
Houston TX 77001

Dear Ms Price, This is to advise you that the employees at Curtain [*sic*] -Matheson Scientific in the appropriate bargaining unit represented by the Teamsters Local Union 968 have accepted the company's last offer of May 25 1979 regarding a collective bargaining agreement. Please advise as to a time and place to meet with you to discuss this matter.

Sincerely

Howard Reed, Business Representative
Teamsters Local Union 968 (3100 Katy Frwy Houston TX 77007)

10:01 EST

MGMCOMP MGM

APPENDIX H

WESTERN UNION MAILGRAM

4-044148S200002 07/19/79 ICS IPMBNGZ CSP HOUB
1 7138697133 MGM TDBN HOUSTON TX 07-19
0300P EST

HOWARD REED BUSINESS REPRESENTATIVE
TEAMSTERS LOCAL 968
3100 KATY FREEWAY
HOUSTON TX 77007

This Mailgram is a confirmation copy of the following message:

7138697133 TDBN Houston TX 18 07-19 0300P EST
PMS Elizabeth Price, Personnel Manager Curtin Matheson Scientific RPT DLY MGM, DLR
4220 Jefferson Ave
Houston TX 77001

Dear Ms Price, Please advise us as to your availability so that we may execute the agreement. Sincerely,

Howard Reed, Business Representative
Teamsters Local Union 968
3100 Katy Freeway
Houston TX 77007)

15:02 EST

MGMCOMP MGM

APPENDIX I

WESTERN UNION MAILGRAM

4-044125S201002 07/20/79 ICS IPMBNGZ CSP HOUB
2 7139231661 MGM TDBN HOUSTON TX 07-20
0235P EST

HOWARD REED TEAMSTERS LOCAL 968
3100 KATY FREEWAY
HOUSTON TX 77007

This is a confirmation copy of a previously phone-delivered telegram

This is in response to your telex dated July 16 1979 in which you stated your intent to accept our proposal of May 25 1979. First our offer of May 25 1979, which was rejected by Local 968 on behalf of our warehouse employees, is not now available for you to accept. Moreover, please be advised that Curtin Matheson Scientific Incorporated doubts that Local 968 has the support of a majority of its current warehouse employees and we, therefore, decline to recognize and/or bargain with you or the representatives of those employees.

In the event that you believe that you have the support of a majority of our employees, we invite you to file a petition for an election with the N L R B.

Elizabeth Price, Director, Personnel Curtin Matheson Scientific Inc

14:36 EST

MGMCOMP MGM

APPENDIX J

ANDREWS, KURTH, CAMPBELL & JONES
ATTORNEYS
2500 EXXON BUILDING
HOUSTON, TEXAS 77002
(713) 652-2500

August 22, 1979

Mr. Bernard Middleton, Attorney
National Labor Relations Board
One Allen Center, Suite 920
500 Dallas Avenue
Houston, Texas 77002

Re: Curtin Matheson Scientific, Inc.
Case No. 23-CA-7620

Dear Mr. Middleton:

As you requested, this letter is to inform you of the legal basis for the Company's position in response to the above referenced charge.

On or about June 13, 1979, in the midst of contract negotiations, Local Union No. 968 of the Teamsters went on strike against the Company and picketed its premises continuously thereafter. The Company chose to continue to operate, and commencing on June 25, 1979, hired permanent replacements for the strikers. On July 20, 1979, the Company notified the Union by telegram that it declined to recognize the Union as the representative of the majority of the employees and/or bargain with it. As of that date, there were more replacements and old employees who had openly repudiated the Union on the Company's payroll than there were old employees who had not repudiated the Union. Essential to the Company's refusal is the presumption that the replacements do not support the Union.

The Company maintains that in view of these facts, the Union no longer enjoys the presumption of continued majority support. A recent case decided by the Fifth Circuit, *NLRB v. Randle-Eastern Ambulance Service, Inc.*, 584 F.2d 720, 99 LLRM 337 (5th Cir. 1978) upholds the employer's refusal to recognize a union under similar circumstances. In that case, the employer had also hired a substantial number of permanent replacements and about 20% of the strikers had resigned from the Company. In such a context, the Court rejects the presumption that new employees "support the Union in the same ratio as those they have replaced," stating:

> This presumption is usually applied when the employer has experienced high turnover and is trying to escape his bargaining obligation by citing that turnover as his 'objective evidence.' See *J. Ray McDermott & Co., supra,* at 859; *NLRB v. Washington Manor, Inc.*, 6 Cir., 1975, 519 F.2d 750, 753, 89 LRRM 3044. In our view, however, the presumption does not apply where the 'turnover' results from replacement of strikers. See R. Gorman, Labor Law 112 (1976): "[I]f a new hire agrees to serve as a replacement for a striker (in union parlance, a strike breaker, or worse), it is generally assumed that he does not support the union and that he ought not to be counted toward a union majority."

The Eighth Circuit has also rendered an opinion along the same lines, declining to uphold the Board's finding of an unfair labor practice when an employer refused to bargain with a union. *National Car Rental System v. NLRB,* __ F.2d __, 100 LRRM 2824 (8th Cir. 1979). There, the company had replaced all ten of its striking employees. The Court characterizes the application of the presumption of continued majority support as "wholly unwarranted and unrealistic" under these circumstances, using similar language as the Fifth Circuit. The Court further states:

> If this presumption were to be employed here, we would reach the ridiculous result of presuming that all of the ten new employees favored representation by the union even though they had crossed the union's picket lines to apply for work and to report to work each day after they were hired. This presumption of the Board is not specifically authorized by statute and is so far from reality in this particular case that it does not deserve further comment.

If I can be of further assistance to you on this matter, please let me know.

Very truly yours,

/s/ James V. Carroll, III

JAMES V. CARROLL, III

094:va

UNITED STATES OF AMERICA
BEFORE
THE NATIONAL LABOR RELATIONS BOARD
REGION TWENTY-THREE

CURTIN MATHESON SCIENTIFIC, INC.

and Case No. 23-CA-7620

GENERAL DRIVERS, WAREHOUSEMEN & HELPERS, LOCAL 968, AFFILIATED WITH INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA

AFFIDAVIT IN OPPOSITION TO GENERAL COUNSEL'S MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF THE COMPANY'S MOTION FOR SUMMARY JUDGMENT

STATE OF TEXAS)
) ss:
COUNTY OF HARRIS)

Elizabeth Price, being duly sworn, deposes and says:

1. I am Director, Employee Relations for Curtin Matheson Scientific, Inc., the above-named charged party, and was the Director, Employee Relations thereof at all times mentioned herein. I have personal knowledge of the matters herein referred to, and make this affidavit in opposition to the Acting General Counsel's Motion for Summary Judgment and in support of the Company's Motion for Summary Judgment.

2. The latest contract between Curtin Matheson Scientific, Inc. and Local Union No. 968 expired on May 21, 1979. Negotiations began on May 8, 1979, but no agreement was reached, and the final negotiating session was held on June 12, 1979. At that meeting, Howard Reed, Business Representative for Local 968, rejected each proposal of the company's latest offer, article by article. On

June 25, 1979, the Company hired replacements for the strikers. Prior to Local 968's telex of July 16, 1979, in which it attempted to accept CMS's proposals of May 25, 1979, CMS had a good faith doubt of the Union's majority support. This doubt was based on:

a. The bargaining unit consisted of 26 employees prior to the strike;

b. Twenty-nine (29) permanent replacements who had to cross a hostile picket line were hired on June 25, 1979;

c. The shop steward and Union negotiating committee member, Shady Goodson, had told me that the Union was useless and that the employees were paying their dues for nothing. He also stated that the employees did not support the Union strike and that the issues the Union was striking over were of no interest to the employees;

d. Former steward, J. R. Blackshire, told me that everyone was sick of the Union and that the employees had no use for the Union. He said that this was the way all the employees felt;

e. A number of employees told me that the Union was not doing anything for them;

f. Clint Waller resigned from the Union and told me that he did not ever want to have anything to do with the Union again;

g. The Union had difficulty manning the picket line;

h. Five of the 26 old employees were crossing the picket line to come to work;

i. One striker had retired.

j. The Union made no attempt to communicate with the company from June 12 until July 16, 1979.

/s/ Elizabeth Price
ELIZABETH PRICE

Subscribed and sworn to before me this 14 day of December, 1979.

/s/ Joanne M. Potter
Notary Public in and for
HARRIS COUNTY, TEXAS

CERTIFICATE OF SERVICE

I hereby certify that true copies of the foregoing Respondent's Opposition to General Counsel's Motion for Summary Judgment and Cross-Motion for Summary Judgment, along with supporting affidavit, has been mailed, certified, return receipt requested, to Bernard J. Middleton, Counsel for the Acting General Counsel, National Labor Relations Board, Region 23, One Allen Center, Suite 920, 500 Dallas Avenue, Houston, Texas 77002, and to Eric H. Nelson, Attorney for Teamsters Local 968, One Allen Center, Suite 620, 500 Dallas Avenue, Houston, Texas 77002, on this 18th day of December, 1979.

DONALD J. HORTON

GC Ex. 1(i)

UNITED STATES OF AMERICA
BEFORE
THE NATIONAL LABOR RELATIONS BOARD
Houston, Texas

CURTIN MATHESON SCIENTIFIC, INC.

and Case 23-CA-7620

GENERAL DRIVERS, WAREHOUSEMEN & HELPERS, LOCAL 968, AFFILIATED WITH INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA

ORDER DENYING MOTIONS

On September 7, 1979, the Regional Director for Region 23 of the National Labor Relations Board issued a Complaint and Notice of Hearing in the above-entitled proceeding, alleging that Respondent has engaged in, and is engaging in, certain unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Subsequently, on September 18, 1979, Respondent filed an answer, admitting in part and denying in part the allegations of the complaint, alleging affirmative defenses, and requesting that the complaint be dismissed in its entirety.

On November 27, 1979, Counsel for the General Counsel filed with the Board in Washington, D.C., a Motion for Summary Judgment. Subsequently, on December 4, 1979, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. On December 18, 1979, the Respondent

filed an Opposition to General Counsel's Motion for Summary Judgment and Cross-Motion for Summary Judgment and dismissal of Complaint and an Affidavit in Opposition to General Counsel's Motion for Summary Judgment and in Support of the Respondent's Motion for Summary Judgment.

Pursuant to the provisions of section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board, having duly considered the matter, is of the opinion that the complaint, answer, Motion for Summary Judgment, the opposition and Cross Motion for Summary Judgment, including memorandum and affidavit submitted therewith raise substantial and material issues which may better be resolved after a hearing conducted before an Administrative Law Judge. Accordingly,

IT IS HEREBY ORDERED that the General Counsel's Motion for Summary Judgment be, and it hereby is, denied.

IT IS HEREBY ORDERED that Respondent's Cross Motion for Summary Judgment and Motion to Dismiss the complaint be, and it hereby is, denied.

IT IS FURTHER ORDERED that this proceeding be, and it hereby is, remanded to the Regional Director for Region 23 for the purpose of arranging a hearing before an Administrative Law Judge, and that the said Regional Director be, and he hereby is, authorized to issue a notice thereof.

Dated, Washington, D.C., March 12, 1980.

John H. Fanning, Chairman

Howard Jenkins, Jr., Member

John A. Penello, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

GC Ex 12

TEAMSTERS, GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS LOCAL UNION NO. 968
3100 KATY FREEWAY, HOUSTON, TEXAS 77007
PHONE (713) 869-7133

June 28, 1979

Ms. Elizabeth Price
Director – Personnel
Curtain [*sic*] Matheson Scientific, Inc.
4220 Jefferson Ave.
P. O. Box 1546
Houston, Texas 77001

Dear Ms. Price:

This will acknowledge receipt of your letter dated June 8, 1979 and postmarked June 25, 1979 (seventeen (17) days later), and received by us on June 26, 1979, wherein you state that, "I am disappointed with your statement that you will not make known to us the basis upon which you feel the impasse could be resolved".

As you are aware, this statement has never been made by me or anyone else involved in the negotiation from the Union side of the table.

The facts are, and continue to be, that the Union throughout the entire negotiation, in every meeting held with you and your committee, consistently pointed out the areas that we felt would make your proposal unacceptable to the people, but the Company was not persuaded to make any movement. In fact, the only progress made in the negotiations was where the Union either withdrew it's [*sic*] proposal, or took the Company's proposal and reworked it or accepted it in it's [*sic*] entirety.

Your position has been that most of the items in your proposal are firm and that you cannot or will not move. This is what has caused the impasse and created the situation that now exists.

When you are willing to negotiate and bargain in good faith, I am sure the log jam can be broken, and we can reach an agreement that will be acceptable to all parties involved.

Sincerely,

/s/ Howard Reed
HOWARD REED
Business Representative
Teamsters Local Union 968

HR/mh

CERTIFIED MAIL # 938123
RETURN RECEIPT REQUESTED

Curtin Matheson Scientific, Inc.
GENERAL OFFICES: 4220 JEFFERSON AVE. P. O. BOX 1546 HOUSTON, TEXAS 77001 PHONE: 713-923-1661

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The Houston Branch and International Division have hired permanent replacements for those employees who are on strike. All positions have been filled, however, employees who make an unconditional request for reinstatement will be notified when openings occur for which they are qualified. Please keep us informed of your current address and continued interest in reinstatement.

R. K. Blalock 6-22-79
Employee's Signature Date

Elizabeth Price 6-22-79
Company's Representative Date

NATIONAL LABOR RELATIONS BOARD
Docket No. 23-CA-7620 OFFICIAL EXHIBIT NO. R-6(a)
Disposition — Identified ✓
Received ✓
Rejected
In the matter of Curtin Matheson
Date 6-10-80 Witness Price Reporter ga
No. Pages 1

Respondent 6 a

June 27, 1979
Memorandum of Conversation

Elizabeth Price

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On June 27, 1979, J. R. Blackshire, a striking warehouseman came in to talk with Tim Martin and myself about reinstatement to his position with CMS. He signed the form we had prepared indicating that he was requesting unconditional reinstatement. J. R. told us that he came back after vacation and absolutely was appologetic about the strike in not knowing what was going on because he was on vacation. He indicated that he holds nothing against the Company and that the whole situation was too bad. He returned the key to the cage at that time. J. R. indicated to Tim and I that he refused to walk the picket line after awhile because he was totally dissatisfied with the Union. Then he got another job and didn't want to walk it any more anyway. He came back and asked for his job back. J. R. was very outspoken against the Union. He expressed considerable animosity about the lack of pay for walking the picket line. He was absolutely appalled that they took out the union dues of $12.00 when they handed him his money for one week of walking the picket line. He never received any more strike money after that. He was also upset that he had to go to the Union Hall to pick his money up instead of having them bring it to him on the line. J. R. indicated that the Union was really doing nothing for the employees and that he could not support a Union like that. Throughout the conversation J. R. did most of the talking and we did the listening. He obviously wanted to get the whole matter off his mind.

When the meeting broke up with J. R., I started walking out in the warehouse and he was out there talking to some people. He called me over to his side and started talking. I immediately asked Ian Knapp to come over and talk with us so that there would be a witness. J. R. kept telling us that there wasn't a Union any more. He said they had lost all their support from the employees in the unit. He indicated that there were many others who wanted to come back to work and didn't want the Union to represent them any more. They like him, simply didn't want anything to do with that Union and we did little more than stand there and nod our head. The only thing we could tell him was that those individuals who wanted their job back should come in and tell us that and sign one of those little sheets of paper that he did. He then gave us the names of people that we should want back because he thought they were good workers. They were Alvin Steele, Betty Goodson, Pete Doucett, and Raymond Brunner.

J. R. repeated a number of times in the conversation that he had no grudges against anyone in the situation except that he was upset that the Union did not do a better job of representing the people and doing what they wanted with the contract. He repeated again the information he had told Tim and I that he didn't walk on the picket line because he just didn't support the Union. The Union, he said, protected only the bad employees and that those that were good didn't get any help from the Union at all.

There's a note that says "They (five) never had any problem getting through the picket line." A couple lines down there's another note that said "protected the bad employees." The two notes at the very bottom of the page do not mean anything to me at this point.

6b

6-19 10:00 a.m.

Lady Gardens, Rock Price

- He called Fred 2 or 3 times and Fred kept referring him to Jim. Fred never did find out what he wanted
- Finally he called Jim. Asked him [illegible]
- SG didn't come in but called 1-2 days later and then came in today at 10:00
- SG did all the talking. He wanted his $ & $. Howard wanted the strike and not the membership. He said he wasn't happy all the members had said it had not done any good for the employees
- Felt he was paying dues for nothing!
- He was upset about getting no compensation from Howard or any of the employees on picket. He had to do picket roster and people would not support him at U. In middle — e's that did not want strike, U that did.
- Until would not have the problem. Has Brady
- Pete and J.R. want to return to work.
- Personal vendetta of Howard because sees us of no interest to us.
- Wants to come back - 13 yrs CMS - not many like
- He to call us

NATIONAL LABOR RELATIONS BOARD
Docket No. 23-CA-7620 OFFICIAL EXHIBIT NO. R-7
Disposition — Identified ✓ / Received ___ / Rejected ___
In the matter of Custom Mattresses
Date 6-10-80 Witness Price Reporter Ja
No. Pages 1

Respondent 7

Curtin Matheson Scientific, Inc.
GENERAL OFFICES: 4220 JEFFERSON AVE. P. O. BOX 1546 HOUSTON, TEXAS 77001 PHONE: 713-923-1661

The Houston Branch and International Division have hired permanent replacements for those employees who are on strike. All positions have been filled, however, employees who make an unconditional request for reinstatement will be notified when openings occur for which they are qualified. Please keep us informed of your current address and continued interest in reinstatement.

Peter Doucette — 6/28/79
Employee's Signature — Date

Richard Price — 6/28/79
Company's Representative — Date

NATIONAL LABOR RELATIONS BOARD
Docket No. 23-CA-7620 OFFICIAL EXHIBIT NO. R-8(a)
Disposition — Identified ✓ / Received / Rejected
In the matter of Curtin Matheson
Date 6-10-80 Witness Price Reporter Jon
No. Pages 1

Respondent 8a

147

June 28, 1979
Memorandum of Conversation

Elizabeth Price

Tim Martin and I talked with Pete Doucett today regarding his request for reinstatement. Pete said repeatedly that he would rather work than be out on the picket line. He was use to the work at CMS and he liked the people there and the work. He had worked for CMS a long time and wanted to work here again.

NATIONAL LABOR RELATIONS BOARD
Docket No. 22-CA-7620 OFFICIAL EXHIBIT NO. R-8(b)-1
Disposition — Identified ✓
Received ✓
Rejected
In the matter of Curtis Mathewson
Date 6-10-80 Witness Price Reporter Gal
No. Pages 1

8b

C. M. S. 7/10/79

Mr. Jim Martin

Dear Sir:

Due to the lock out and strike. I wish to take early retirement at age 62

would you please send this info on T.D the Draper Person and mail me my benefits My sick and Vacation Pay also my Profit sharing and retirement Pay

Thank
Raymond Brunner

Respondent 9a

149

July 12, 1979
Memorandum of Conversation

Elizabeth Price

Tim Martin and I talked to Raymond Brunner regarding his retirement. He said that he came to the decision to retire because he didn't want to work with the union people again. He wanted out. His wife was working and he just didn't want to mess with the union. He thought the union protected the wrong employees and that they hadn't negotiated very good. He thought the strike was totally unnecessary and all the union's fault.

NATIONAL LABOR RELATIONS BOARD
Docket No. 25-CA-7620 OFFICIAL EXHIBIT NO. R-9(b)
Disposition — Identified ✓
Received ✓
Rejected
In the matter of Custom Maid
Date 6-10-80 Witness [illegible] Reporter [illegible]
No. Pages 1

9b

PERSONNEL

JUL 23 1979

Clint Waller
10614 Burkmell
Houston Texas 77016
July 19, 1979
(631-3095)

150

Curtin Matheson Scientific, Inc.
Director, Personnel
Mrs. Elizabeth Price
4220 Jefferson
Houston Texas

Dear Mrs. Price,

Enclosed is a copy of the letter of my resignation to the Teamster Union, Local 968, I have sent to Mr. Howard Reed. I have also sent a copy of this letter of my resignation of the Teamster Union, Local 968 to Mr. Jim Cooke - Operation Manager of the International Branch and a copy also to the Texas Employment Commission stating that I am no longer a member in hopes to be a member.

I will like to return back to work at Curtin Matheson Scientific, Inc. if I haven't been terminated by the company if I haven't been terminated, I will like to know how long I will have to wait to return back to work. Please keep my correct mailing address and home phone number.

Sincerely yours, Respondent
Clint Waller 10a

151

Clint Fuller
10614 Lowknoll
Houston, Texas 77016
July 19, 1979

Houston Teamster Union
Local 968
c/o Wm. Howard Peek
3100 Katy Freeway
Houston, Texas 77007

Dear Wm. Howard Peek,

This is a letter of my resignation as a member of the Teamster Union, local 968 out at Curtis Mathes Electronic Inc., 4220 Jefferson, Houston, Texas 77023.

I wish not to be a member of the Teamsters no longer at Curtis Mathes Electronic Inc. or anywhere else. That is why I haven't been out for the last three or four weeks.

I am now seeking employment either back at Curtis or else where through local different agency.

Yours Truly,
Clint Fuller

10b

p. 111

Curtin Matheson Scientific, Inc.
GENERAL OFFICES: 4220 JEFFERSON AVE. P. O. BOX 1546 HOUSTON, TEXAS 77001 PHONE: 713-523-1661

152

July 26, 1979

Ms. Anna Jimenez
6605 Avenue N
Houston, Texas 77011

Dear Anna:

We understand through some of our employees, that you have obtained a position with the U. S. Post Office. If this is the case and you wish to resign from CMS, we would like to get our records straight by receiving your written resignation. As soon as we have the resignation, we will determine what monies are due you for vacation pay, profit sharing, etc., and mail them to you.

If you need any information or have questions, please do not hesitate to contact me.

Sincerely,

Elizabeth Price

Elizabeth Price
Director - Personnel

EP/jc

NATIONAL LABOR RELATIONS BOARD
Docket No. 23-CA-7620 OFFICIAL EXHIBIT NO. R-11 (a)
Disposition — Identified ✓ Received ✓ Rejected
In the matter of Curtin Matheson
Date 6-10-80 Witness Price Reporter Jo
No. Pages 1

Respondent 11a

153

July 26, 1979

I, Anna Jimenez, voluntarily resign my employment with Curtin Matheson Scientific, Inc., effective July 26, 1979.

Anna Jimenez

NATIONAL LABOR RELATIONS BOARD
Docket No. 13-CA-7620 OFFICIAL EXHIBIT NO. R-11(b)
Disposition — Identified ✓ / Received ✓ / Rejected
In the matter of Curtin Matheson
Date 6-10-80 Witness Sikes Reporter JC
No. Pages 1

11b

July 19, 1979

I, Shady Goodson, voluntarily resign my employment with Curtin Matheson Scientific, Inc. effective July 19, 1979.

Shady Goodson

NATIONAL LABOR RELATIONS BOARD
Docket No. 23-CA-7620 OFFICIAL EXHIBIT NO. R-12(a)
Disposition — Identified ✓ / Received ___ / Rejected ___
In the matter of Curtin Matheson
Date 6-10-80 Witness Price Reporter JA
No. Pages 1

Respondent 12a

155

July 20, 1979

I, Robbie Madison, voluntarily resign my employment with Curtin Matheson Scientific, Inc., effective July 20, 1979.

Robbie Madison

Robbie Madison

NATIONAL LABOR RELATIONS BOARD
Docket No. 23-CA-7620 OFFICIAL EXHIBIT NO. R-12(b)

Disposition — Identified ✓ / Received ✓ / Rejected

In the matter of Curtin Matheson

Date 6-10-80 Witness Price Reporter ga

No. Pages 1

12b

July 23, 1979

I, Wilfred Green, voluntarily resign my employment with Curtin Matheson Scientific, Inc., effective July 23, 1979.

Wilfred Green

NATIONAL LABOR RELATIONS BOARD
Docket No. 23-CA-7620 OFFICIAL EXHIBIT NO. R-12(c)

Disposition — Identified ✓
Received ✓
Rejected

In the matter of Curtin Matheson
Date 6-10-80 Witness [illegible] Reporter [illegible]
No. Pages 1

12 c

PERSONNEL
JUN 3 1 1979

157

July 24, 1979

I, John Thompson, voluntarily resign my employment with Curtin Matheson Scientific, Inc., effective July 24, 1979.

John E. Thompson
John Thompson

NATIONAL LABOR RELATIONS BOARD
Docket No. 23-CA-7620 OFFICIAL EXHIBIT NO. R-12(d)
Disposition — Identified ✓
Received ✓
Rejected
In the matter of Curtin Matheson
Date 6-10-80 Witness [illegible] Reporter JA
No. Pages 1

12d

July 24, 1979

I, Joanne Stephens, voluntarily resign my employment with Curtin Matheson Scientific, Inc., effective July 24, 1979.

Joanne Stephens

NATIONAL LABOR RELATIONS BOARD
Docket No. 23-CA-7620 OFFICIAL EXHIBIT NO. R-12(a)

Disposition — Identified ✓
Received ✓
Rejected

In the matter of Curtin Matheson
Date 6-[illegible] Witness Price Reporter JA

12 e

159

July 24, 1979

I, Joe Doby, voluntarily resign my employment with Curtin Matheson Scientific, Inc., effective July 24, 1979.

Joe Doby

NATIONAL LABOR RELATIONS BOARD
Docket No. 23-CA-7620 OFFICIAL EXHIBIT NO. R-12 (f)
Disposition — Identified ✓
Received ✓
Rejected
In the matter of Curtin Matheson
Date 6-10-80 Witness [illegible] Reporter [illegible]
No. Pages 1

12f

July 24, 1979

I, J. R. Blackshire, voluntarily resign my employment with Curtin Matheson Scientific, Inc., effective July 24, 1979.

J. R. Blackshire
J. R. Blackshire

NATIONAL LABOR RELATIONS BOARD
Docket No. 23-CA-7620 OFFICIAL EXHIBIT NO. R-12(g)
Disposition — Identified ✓ Received ✓ Rejected
In the matter of Curtin Matheson
Date 6-10-80 Witness Price Reporter Gr
No. Pages 1

12g

161

July 25, 1979

I, Pete Doucette, voluntarily resign my employment with Curtin Matheson Scientific, Inc., effective July 25, 1979.

Pete Doucette

NATIONAL LABOR RELATIONS BOARD

Docket No. 23-CA-7620 OFFICIAL EXHIBIT NO. R-12(h)

Disposition — Identified ✓ Received ✓ Rejected

In the matter of Curtin Matheson

Date 6-10-80 Witness [illegible] Reporter JA

No. Pages 1

12 h

July 26, 1979

I, Anna Jimenez, voluntarily resign my employment with Curtin Matheson Scientific, Inc., effective July 26, 1979.

Anna M. Jimenez

Anna Jimenez

NATIONAL LABOR RELATIONS BOARD
Docket No. 23-CA-7620 OFFICIAL EXHIBIT NO. R-12(i)

Disposition — Identified ✓
Received ✓
Rejected

In the matter of Curtin Matheson
Date 6-10-80 Witness [illegible] Reporter [illegible]
No. Pages 1

12 i

163

August 1, 1979

I, Clint Waller, voluntarily resign my employment with Curtin Matheson Scientific, Inc., effective August 1, 1979.

Clint Waller

NATIONAL LABOR RELATIONS BOARD

Docket No. 33-CA-76,20 OFFICIAL EXHIBIT NO. R-12(j)

Disposition — Identified ✓
Received ✓
Rejected

In the matter of Curtin Matheson

Date 6-10-80 Witness Price Reporter JO

No. Pages 1

12 j

August 8, 1979

I, Pablo Sanchez, voluntarily resign my employment with Curtin Matheson Scientific, Inc., effective August 8, 1979.

Pablo R. Sanchez

Pablo Sanchez

NATIONAL LABOR RELATIONS BOARD

Docket No. 23-CA-7620 OFFICIAL EXHIBIT NO. R-12(K)

Disposition — Identified ✓ Received ✓ Rejected

In the matter of Curtin Matheson

Date 6-10-80 Witness [illegible] Raporter [illegible]

No. Pages 1

12 K

7-19-79

165

Craig Allee - everything is fine now. He think he is catching on real well and likes the work he is doing. No problems. No suggestions. Union thing doesn't exter his mind

Jim Hastman - everything is going okay. The work is easier than the other work he has done. His supvisors don't bother him. He heard a rumor that we were going to lay people off next week so the strikers could come back.

Rafeal Torres - he likes the company and really appreciates us letting him work here. He has been assigned everywhere & has done 100% on all jobs. He's going to work hard and want a lot of pats on the back.

NATIONAL LABOR RELATIONS BOARD
Docket No. 33-CA-7620 OFFICIAL EXHIBIT NO. R-13(a)
Disposition — Identified ✓ Received _____ Rejected _____
In the matter of Custom Distribution
Date 6-10-80 Witness _____ Reporter _____
No. Pages 1

Respondent 13a

7-18-79
10:10

Vera Thomas – absolutely no problems
– always gets questions answered
– drivers are helpful
– everyone treats her nicely
– she's working on a suggestion to redo the local line

David Vaughn – really gets a kick out of what he is doing
– hates missing work
– likes bulk packing best
– hopes to work here a long time

Esrnah Manson – everything is going well
– he will come see me in 3-6 months to ask about another position
– needs to stay in chemicals because it's a little more challenging
– supervisors and office workers are very helpful.
– thinks Lynn is fantastic. Someone (type) he always wanted to know tells him exactly where he stand
– Integration of office and whse is good
– Compared to other places he's work this is the ① best ② most organized

Rhonda White – boxes heavier than she thought
– it's better than she thought but the fans help. 13b
– Dan and she have had a couple "debates" about her work

- Nita irritated her because she didn't know who she was and she kept following her around.
- Blew up at Nita w/ Dan there. Has apologized to Dan
- everything else is OK
- 1/2 hr. lunch is too short
- Too much OT

NATIONAL LABOR RELATIONS BOARD

Docket No. 23-CA-7620 OFFICIAL EXHIBIT NO. R-13(c)

Disposition — Identified ✓
Received ✓
Rejected

In the matter of Custom Mattress

Date 6-10-80 Witness Price Reporter JN

No. Pages 1

13c

Cheryl McDougald - has had very few problems although she is glad she is in receiving and not in the other section where they have had so many problems. She wonders if she is too slow in her work but thinks she is fairly accurate. Supervision is ok. She sees in receiving fight (argue) a lot but she's just going to continue to ignore it and go her way. No complaints or suggestions.

Emily Glover - she's back "in the family" and is going to work hard for the company's succes She speaks up when there is a problem and doesn't hesitate to apply a little peer pressure. She is going to talk to Dan about having to repack all the poorly packed items. She did 16 yesterday and 5 already today. Packers are not initialing so you can't see who did it wrong.

Sandra Hutto - was really concerned about her job when the lockout started but enjoys it now. The pressure is off of her a little. She is disgusted with the poor work done by packers. Was out sick 4 days and never will be again because of all the problems she had now.

Art Reyes - no problems - likes his work doesn't have much to say but will let me know if I can help him in any way.

12d

7-19-79

169

Steve Lyda - likes it here
- thinks he's been treated fairly and enjoys what he is doing.
- he was interested in my comment that he was doing well because he had no idea whether or not his performance was adequate - just needs a pat on the back.

David Schneider - is very impressed with Lloyd's card system for finding merchandise and the overall organization of the whse
- he respects Lloyd and enjoys working for him. David looks forward to the day when he and Steve know enough that they can work harder than Lloyd.
- he commented on the fact that the union obviously didn't support the people. He's worked & sees advantages to both union and non-union. As long as the company treats him good though he can't see any need for a union.

13e

Kathy Stowers - <u>everyone</u> will be leaving as soon as they can afford to because of the petty attitude of mgmt
- harrass them about the small things like her walking to see Rhonda in afternoon even though her work is done
- ½ hr. is way too short considering how far they have to walk. They shouldn't have to punch in or out
- Burgoon is spreading rumors about she and Rhonda being lesbians. Kathy may lose her temper and deck her.
- Kathy volunteered for OT and they don't have her work. In light of all the mandatory OT, she thinks it's dumb
- Only two who are staying are the two others in Sutil.
- It's too hard to get to the bank because they don't get checks until Friday afternoon and only have ½ hour lunch on Mon.

-she thought she should have been paid for her illness when she was in the hospital even though the benefits say 90 days

13 f

Curtin Matheson Scientific, Inc.
GENERAL OFFICES: 4220 JEFFERSON AVE. P. O. BOX 1546 HOUSTON, TEXAS 77001 PHONE: 713-923-1661

The Houston Branch and International Division have hired permanent replacements for those employees who are on strike. All positions have been filled, however, employees who make an unconditional request for reinstatement will be notified when openings occur for which they are qualified. Please keep us informed of your current address and continued interest in reinstatement.

Employee's Signature — 6/28/79 Date

Company's Representative — 6/28/79 Date

NATIONAL LABOR RELATIONS BOARD
Docket No. 25-CA-7620 OFFICIAL EXHIBIT NO. R-14
Disposition — Identified ✓ Received ____ Rejected ____
In the matter of Curtin Matheson
Date 6-10-80 Witness ____ Reporter ____
No. Pages 1

Respondent 14

172

Supreme Court of the United States

No. 88-1685

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

CURTIN MATHESON SCIENTIFIC, INC.

ORDER ALLOWING CERTIORARI

Filed June 26, 1989

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted.

June 26, 1989

U.S. GOVERNMENT PRINTING OFFICE 1989 – 241 699/00006

Supreme Court, U.S.
FILED
SEP 1 1989
JOSEPH F. SPANIOL, JR.

No. 88-1685

In the Supreme Court of the United States

OCTOBER TERM, 1989

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

CURTIN MATHESON SCIENTIFIC, INC.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONER

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Associate General Counsel
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Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether, in assessing the reasonableness of an employer's asserted doubt that an incumbent union enjoys continued majority support, the Board may refuse to apply any presumption regarding the extent of union support among replacements for striking employees.

PARTIES TO THE PROCEEDING

In addition to the parties identified in the caption, the following union also appeared in the proceeding before the Board and the court of appeals: General Drivers, Warehousemen and Helpers, Local 968, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO.

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In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 88-1685

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

CURTIN MATHESON SCIENTIFIC, INC.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-24a) is reported at 859 F.2d 362. The decision and order of the National Labor Relations Board (Pet. App. 25a-54a) are reported at 287 N.L.R.B. No. 35.

JURISDICTION

The judgment of the court of appeals (Pet. App. 55a) was entered on November 4, 1988, and a petition for rehearing was denied on December 22, 1988 (Pet. App. 56a-57a). On March 8, 1989, Justice White extended the time within which to file a petition for a writ of certiorari to and including April 21, 1989. The petition was filed on April 17, 1989, and was granted on June 26, 1989. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 8(a)(1) and (5) of the National Labor Relations Act (NLRA), 29 U.S.C. 158(a)(1) and (5), provides:

> (a) It shall be an unfair labor practice for an employer –
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

Section 7 of the NLRA, 29 U.S.C. 157, provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

STATEMENT

A. The Development Of The Board's No-Presumption Rule

1. Pursuant to Section 9 of the National Labor Relations Act, 29 U.S.C. 159, the National Labor Relations Board may certify a particular labor organization as the exclusive bargaining representative for a company's employees. Once the Board has done so, the union "usually is entitled to a conclusive presumption of majority status for one year following the certification." *Fall River Dyeing & Finishing Corp.* v. *NLRB*, 482 U.S. 27, 37 (1987). Accord *NLRB* v. *Burns International Security Services, Inc.*, 406 U.S. 272, 279 n.3 (1972); *Brooks* v. *NLRB*, 348 U.S. 96, 98-99 (1954). See also 29 U.S.C. 159(c)(3). "[A]fter this period, the union is entitled to a rebuttable presumption of majority support." *Fall River Dyeing*, 482 U.S. at 38; *Burns International*, 406 U.S. at 279 n.3. An employer may rebut that presumption and withdraw recognition from the union by showing either (1) that the union did not in fact enjoy majority status, or (2) that there was a sufficient, objective basis for a reasonable doubt of the union's majority status.[1] The question presented in this case is whether, in evaluating an employer's claim that it has an objective, reasonable basis for doubting a union's majority status, the Board must presume that striker replacements oppose the union.

The Board has long held that *new employees* in general (as opposed to *striker replacements* in particular) may be presumed to support an incumbent union in the same pro-

[1] See, *e.g.*, *Whisper Soft Mills, Inc.* v. *NLRB*, 754 F.2d 1381, 1387 (9th Cir. 1984); *NLRB* v. *Pennco, Inc.*, 684 F.2d 340, 342 (6th Cir.), cert. denied, 459 U.S. 994 (1982); *NLRB* v. *Windham Community Memorial Hosp.*, 577 F.2d 805, 811 (2d Cir. 1978); *Retired Persons Pharmacy* v. *NLRB*, 519 F.2d 486, 489 (2d Cir. 1975). Cf. *Fall River Dyeing*, 482 U.S. at 41 n.8. If the union contests the withdrawal of recognition and the employer is unable to sustain his burden, the Board will find a violation of Section 8(a)(5) and (1) of the Act. Employee members of the bargaining unit may petition for a decertification election upon a showing that at least 30% of the unit employees do not want to be represented by the bargaining representative. 29 C.F.R. 101.18(a). An employer who has a good faith doubt of continuing majority status may also petition for a decertification election. *United States Gypsum Co.*, 157 N.L.R.B. 652, 655-656 (1966).

portion as the employees they replace. *National Plastic Products Co.*, 78 N.L.R.B. 699, 706 (1948); *C & C Plywood Corp.*, 163 N.L.R.B. 1022, 1028 (1967). See also *Great Southern Trucking Co.* v. *NLRB*, 139 F.2d 984, 985-986 (4th Cir.), cert. denied, 322 U.S. 729 (1944); *NLRB* v. *Franks Bros.*, 137 F.2d 989, 995 (1st Cir. 1943), aff'd, 321 U.S. 702 (1944).[2] At least initially, however, the Board did not apply that presumption in assessing the union sentiments of striker replacements. In its earliest decisions, the Board held that, in establishing a good faith doubt, it was not "unreasonable [for an employer] to assume that none of [its] permanent replacements were union adherents" (*Stoner Rubber Co.*, 123 N.L.R.B. 1440, 1444 (1959)). Accord *Jackson Mfg. Co.*, 129 N.L.R.B. 460, 478 (1960) ("most improbable" that "the replacements hired during the strike had chosen the Union to represent [them]"); *Titan Metal Mfg. Co.*, 135 N.L.R.B. 196, 215 (1962) (same). But cf. *Arthur A. Borchert*, 90 N.L.R.B. 944, 946 (1950), enforced in relevant part, 188 F.2d 474 (4th Cir. 1951) ("no certainty" that replacements not themselves union adherents).

In a 1974 decision, however, the Board recognized that "replacements, who had chosen not to engage in the strike activity, might nevertheless have favored union representation" (*Peoples Gas System, Inc.*, 214 N.L.R.B. 944, 947 (1974), reversed and remanded on other grounds *sub nom. Teamsters Local Union 769* v. *NLRB*, 532 F.2d 1385, 1391 (D.C. Cir. 1976)). And by the late 1970s, the Board, breaking entirely with its earlier decisions, extended the presumption regarding other employees to striker replacements. See *Windham Community Memorial Hosp.*,

[2] For that reason, the Board has historically held, an employer may not base an assertion of good faith doubt on "[e]mployee turnover standing alone." *Laystrom Mfg. Co.*, 151 N.L.R.B. 1482, 1484 (1965).

230 N.L.R.B. 1070 (1977), enforced, 577 F.2d 805 (2d Cir. 1978); *Pennco, Inc.*, 250 N.L.R.B. 716 (1980), enforced, 684 F.2d 340 (6th Cir.), cert. denied, 459 U.S. 994 (1982); *James W. Whitfield*, 220 N.L.R.B. 507, 509 (1975). As the Board stated in *Windham Community Memorial Hosp.*, "[t]he general rule * * * is that new employees, including striker replacements, are presumed to support the union in the same ratio as those whom they have replaced" (230 N.L.R.B. at 1070).

2. In its 1987 decision in *Buckley Broadcasting Corp., Local 51, (Station KKHI)*, 284 N.L.R.B. No. 113 (July 27, 1987), application for enforcement pending, No. 88-7106 (9th Cir. filed Mar. 7, 1988) (Pet. App. 58a-91a), the Board revisited the issue. Based on its empirical judgment and considerations of policy, the Board held that no presumption is warranted regarding the extent of union support among striker replacements. Noting that the courts of appeals had "uniformly rejected" its prior position—that permanent replacements are presumed to support the union in the same ratio as the striking employees whom they replaced—the Board "carefully reviewed [its] past decisions and assessed [its] experience to determine if they suggest generalizations about the views of permanent strike replacements that are so universal that they support one overall presumption that can be applied when evaluating a union's majority status" (Pet. App. 72a, 74a). The Board concluded that no such "universal" generalizations could be drawn. It therefore found "no basis for presuming that strike replacements who have accepted employment and are therefore willing to cross a picket line in order to go to work favor union representation" (*id.* at 75a).

Correspondingly, the Board found "the contrary presumption"—that "permanent replacements who cross a

picket line * * * repudiate the union"—"equally unsupportable" (Pet. App. 75a). It noted that a striker replacement "may be forced to work for financial reasons, or may disapprove of the strike in question but still desire union representation and would support other union initiatives" (*ibid.*). In addition to the fact that the contrary presumption is "not factually compelling" (*ibid.*), the Board observed that "adoption of this presumption would disrupt the balance of competing economic weapons long established in strike situations and substantially impair the employees' right to strike by adding to the risk of replacement the risk of loss of the bargaining representative as soon as replacements equal in number to the strikers are willing to cross the picket line" (*id.* at 75a-76a).

In short, the Board in *Station KKHI* "discern[ed] no overriding generalization about the views held by strike replacements and therefore * * * decline[d] to maintain or create any presumptions regarding their union sentiments" (Pet. App. 76a). Instead, the Board held that it would henceforth "review the facts of each case" and "require 'some further evidence of union non-support' before concluding that an employer's claim of good-faith doubt of the union's majority is sufficient to rebut the overall presumption of continuing majority status" (*ibid.*).

B. The Present Controversy

1. Respondent in a Texas corporation that trades in laboratory instruments and supplies and maintains a warehouse in Houston. On April 15, 1970, the Board certified Local 968, General Drivers, Warehousemen and Helpers (the Union) as the collective bargaining agent for respondent's production and maintenance employees. On May 21, 1979,[3] the latest collective-bargaining agreement between the parties expired, and on May 25 the company made its final offer. The Union rejected that offer on May

[3] All dates given are in 1979 unless otherwise noted.

29. Respondent locked out all 27 bargaining-unit employees from June 4 to June 12, when respondent renewed its offer of May 25. The Union again rejected it. Pet. App. 2a-3a.

On June 13, the Union began an economic strike. Five of the 27 bargaining-unit employees immediately crossed the picket line and returned to work. On June 17, respondent put into effect the wage schedule proposed in its May 25 offer. On June 25, with the strike still in progress, respondent hired 29 new employees to replace the 22 strikers.[4]

On July 16, the Union ended its strike, offering unconditionally to accept the May 25 offer. On July 19, the Union asked respondent to execute a contract embodying the May 25 terms. The following day, July 20, respondent notified the Union that the May 25 offer was unavailable. It also stated that because it entertained doubts about the Union's continued majority status, it was withdrawing recognition and refusing to bargain further. As of that date, the bargaining unit consisted of 19 employees who had participated in the strike, 25 replacements, and five "crossover" employees who had crossed the picket line and were then working for the company. Pet. App. 3a.

Also on July 20, the Union asked the respondent to furnish information regarding the total number of bargaining-unit employees on the payroll, and the job classification and seniority of each of those employees. Respondent refused. Pet. App. 3a-4a.

[4] Respondent's director of employee relations "testified that 29 replacements were hired although only 22 jobs had been opened up by the strike because the Respondent anticipated that some of the hirees would not cross the picket line, that there would be some turnover within a group of new employees that large, and that additional workmen would be needed during the initial training period." Pet. App. 30a n.9.

2. On July 30, the Union filed an unfair labor practice charge with the Board, alleging violations of Section 8(a)(5) and (1) of the NLRA, 29 U.S.C. 158(a)(5) and (1). J.A. 112. On September 7, following an investigation, the General Counsel issued a complaint. J.A. 114; Pet. App. 4a.

The Board, reversing the Administrative Law Judge, held that respondent lacked a reasonable doubt concerning the Union's majority status. Pet. App. 25a-54a. The Board found that "the fact that 5 of the 27 unit employees crossed the picket line does not in itself support an inference that the 5 repudiated the Union as the collective-bargaining representative" (*id.* at 32a). The Board explained that "[t]he failure of employees to join an economic strike may indicate their economic concerns rather than a lack of support for the union" (*id.* at 32a-33a). The Board also found that certain statements of six employees did not clearly evince "repudiations of the Union as the collective-bargaining representative" (*id.* at 34a), and that even if they did, "it would merely signify that 6 employees of a total bargaining unit of approximately 50 did not desire to keep the Union as the collective-bargaining representative" (*id.* at 34a-35a).[5]

Finally, relying on its decision in *Station KKHI*, the Board explained (Pet. App. 33a) that it would not "use any presumptions with respect to the[] union sentiments" of the 25 striker replacements. The Board stated that it would "instead * * * take a case-by-case approach," requiring "additional evidence of a lack of union support on the replacements' part in evaluating the significance of this factor in the employer's showing of good-faith doubt"

[5] The Board found that the remarks of a seventh employee "conveyed only a disapproval of the Union's conduct of the strike," rather than a general "repudiation of the Union as the employees' representative" (Pet. App. 33a).

(*ibid.*). Applying that standard, the Board concluded that "[t]aking into account all the factors relied on by the Respondent to support its asserted reasonable doubt of the Union's majority status, * * * the evidence is insufficient to rebut the presumption of the Union's continuing majority status" (*id.* at 35a).[6] It therefore held that respondent had violated Section 8(a)(5) and (1) by withdrawing recognition from the Union, by refusing to furnish the information that the Union had requested, and by refusing to execute the collective-bargaining agreement proposed by the Union on July 19 and embodying the terms offered by respondent on May 25 (Pet. App. 35a-38a). The Board ordered the company to cease and desist; on request, to bargain with the Union and to execute an agreement based on the May 25 terms; to furnish the requested information; and to post an appropriate notice (*id.* at 39a-42a).

3. The court of appeals denied enforcement by a divided vote, concluding that respondent had established a reasonable doubt of the Union's majority status (Pet. App. 1a-24a). The court first noted (*id.* at 6a-8a) that several employees who crossed the picket line, and others who remained on the picket line, had expressed anti-union sentiments to respondent's director of employee relations. The court next rejected the Board's decision to apply no presumption regarding the preferences of the replacements. The court instead approved (*id.* at 9a & n.1) the so-called "Gorman presumption"—drawn from Professor Gorman's labor law text—according to which " 'it is

[6] In particular, the Board found that the replacements' crossing of a peaceful picket line and the Union's failure to contact those replacements during the strike constituted insufficient evidence from which to infer that they opposed the Union. The Board further found that the arguably anti-union comment of one striker replacement was no basis for inferring the union sentiments of the replacements as a whole. Pet. App. 33a-34a.

generally assumed that [a replacement] does not support the Union and that he ought not to be counted toward a Union majority' " (*id.* at 9a n.1, quoting R. Gorman, *Labor Law* 112 (1976)).[7] The court found that the Gorman presumption was warranted in this case because "a substantial percentage of the bargaining unit employees [was] replaced on the same day, and the striker replacements cross[ed] a picket line" (Pet. App. 10a). Applying that presumption, the court held that "the Company is justified in counting the striker replacements as employees whom they doubt support the Union" (*ibid.*).

Judge Williams dissented (Pet. App. 11a-24a). "The outcome of this case," he explained (*id.* at 12a), "turns on the significance attached to the hiring of permanent replacement workers during an economic strike." In his view, the Board had offered "compelling" reasons for adopting a rule according to which it would "refuse[] to presume that the replacement workers are for or against the union" (*id.* at 13a, 15a). Judge Williams noted that the Board's approach permits it "to take into account the particular circumstances surrounding each strike and the hiring of replacements, while retaining the long-standing requirement that the employer must come forth with some objective evidence to substantiate his doubt of continuing majority status" (*id.* at 15a). Observing that "there is a conflict among the circuits" regarding which, if any, presumption should be applied (*id.* at 17a-18a), Judge Williams concluded that "[t]he refusal to attach any presumptive weight to the hiring of replacement workers is, at the very least, a reasonable policy choice which is not

[7] The term "Gorman presumption" is a misleading one, since it does not appear that Professor Gorman was advocating such a presumption, only that he was reporting the Board's approach as he then understood it. See R. Gorman, *Labor Law* 112-113 (1976).

inconsistent with the National Labor Relations Act" (*id.* at 16a). Accordingly, he stated, "even if this Court prefers a different approach the only proper course is to enforce the Board's view because of the deference we are required to afford the Board's policy decisions" (*ibid.*). Applying the Board's no-presumption rule for replacements, Judge Williams would have enforced the Board's order requiring respondent to recognize and bargain with the Union (*id.* at 20a-24a).

INTRODUCTION AND SUMMARY OF ARGUMENT

The question presented in this case is whether, in seeking to justify its withdrawal of recognition on the basis of a reasonable doubt of a union's majority status, an employer may invoke a presumption that permanent replacements for striking workers do not support the union. Relying on its decision in *Station KKHI*, the Board held in the present case that no such presumption may be invoked. The Board's "no-presumption" rule is plainly "rational and consistent" with the National Labor Relations Act. The rule was therefore "entitled to deference from the courts." *Fall River Dyeing & Finishing Corp.*, 482 U.S. at 42.

Nevertheless, the court of appeals rejected the Board's rule in favor of the so-called Gorman presumption, according to which striker replacements are presumed to oppose the incumbent union. The court's decision misconstrues the no-presumption rule; it substitutes a contrary rule that lacks sufficient empirical or policy support; and it impermissibly second-guesses the Board's accumulated expertise in administering the statute. The judgment of the court of appeals should therefore be reversed.

A. This Court has repeatedly held that "[i]f the Board adopts a rule that is rational and consistent with the Act

* * * then the rule is entitled to deference from the courts." *Fall River Dyeing*, 482 U.S. at 42. Where the Board's decision is based on a reasonable empirical determination, "fashion[ed] * * * in light of its experience" (*Beth Israel Hosp.* v. *NLRB*, 437 U.S. 483, 500 (1978)), this Court has consistently accorded substantial deference to the Board's judgment. Deference is likewise appropriate where the Board's decision is based on a policy judgment designed to implement the broad purposes of the statute. "It is the Board," not the courts, "on which Congress conferred the authority to develop and apply the fundamental national labor policy." *Ibid.* If the Board is to accomplish that task, it "necessarily must have authority to formulate rules to fill the interstices of the broad statutory provisions." *Id.* at 501.

B. The no-presumption rule is plainly "rational and consistent with the Act" (*Fall River Dyeing*, 482 U.S. at 42). Three independent grounds support the Board's rule.

First, the rule reflects a reasonable empirical judgment about the union sentiments of striker replacements. Workers may cross a picket line for any number of reasons, several of which do not suggest opposition to the incumbent union. After "carefully review[ing] [its] past decisions and assess[ing] [its] experience," the Board concluded that no "universal" generalizations could be drawn (Pet. App. 74a). That judgment is surely a rational one.

Second, the no-presumption rule promotes the stability of collective-bargaining relationships. By requiring the employer to estabish the replacements' views on a case-by-case basis, the no-presumption rule limits the employer's ability to oust the incumbent union simply by replacing a sufficent number of the striking employees. By contrast, the Gorman presumption creates incentives for employers to stonewall negotiations, hire unnecessary replacement

workers, and withdraw recognition from the bargaining representative. As such, the Gorman presumption significantly disserves the policy of " 'promot[ing] stability in collective-bargaining relationships, without impairing the free choice of employees' " (*Fall River Dyeing*, 482 U.S. at 38 (brackets in original)).

Finally, the Gorman presumption, imposed by the court below, threatens to chill the exercise of the statutory right to strike. Although striking workers know that they may be lawfully and permanently replaced by their employer, they also know that, through negotiation, they may achieve a settlement agreement that entitles them to reclaim their jobs. Imposition of the Gorman presumption would make it easier for the employer to withdraw recognition from the bargaining representative, and thereby to thwart the strikers' efforts to achieve a back-to-work agreement, as well as a variety of other post-strike benefits. If an unsuccessful strike carries with it the likely loss of representation—in addition to the loss of a job—the strike may become a total defeat for the employees, not just one battle in an ongoing contest. That added risk is apt to chill the exercise of the protected right to strike.

Withdrawal of recognition is not simply the use of an "economic weapon" by an employer; it is an attempt to revoke a status conferred on the union by law in order to effectuate the policies of the Act. Thus, the question of the appropriate grounds for withdrawal is one on which the Board's judgment is especially entitled to deference. And the Board's judgment here—that the Gorman presumption is without sufficient empirical support and would "disrupt the balance of competing economic weapons long established in strike situations" (Pet. App. 74a-76a)—was entirely reasonable.

ARGUMENT

THE BOARD'S NO-PRESUMPTION RULE FOR ASSESSING UNION SUPPORT AMONG STRIKER REPLACEMENTS IS A RATIONAL CONSTRUCTION OF THE NATIONAL LABOR RELATIONS ACT AND SHOULD THEREFORE BE UPHELD

A. The Board's Interpretations of the Act, Whether Based on Empirical Findings Or Policy Judgments, Are Entitled To Substantial Deference If They Are Rational And Consistent With The Statute

"The function of striking [the] balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review." *NLRB* v. *Truck Drivers,* 353 U.S. 87, 96 (1957). See also *Beth Israel Hosp.* v. *NLRB,* 437 U.S. 483, 501 (1978); *American Broadcasting Cos.* v. *Writers Guild of America, West, Inc.,* 437 U.S. 411, 431 (1978); *NLRB* v. *Local Union No. 103, Iron Workers,* 434 U.S. 335, 350 (1978). Accordingly, the Board's judgment, when "applying the general provisions of the Act to the complexities of industrial life," is entitled to substantial deference. *NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221, 236 (1963). As this Court has repeatedly held, "[i]f the Board adopts a rule that is rational and consistent with the Act * * * then the rule is entitled to deference from the courts." *Fall River Dyeing,* 482 U.S. at 42. Accord *Charles D. Bonanno Linen Service, Inc.* v. *NLRB,* 454 U.S. 404, 413 (1982); *Ford Motor Co.* v. *NLRB*, 441 U.S. 488, 495, 497 (1979); *Beth Israel Hosp.*, 437 U.S. at 500-501.[8]

[8] Deference is owed decisions of the Board even where the Board's position represents a change from prior policy. *NLRB* v. *Local Union No. 103, Iron Workers*, 434 U.S. 335, 351 (1978); *NLRB* v. *J. Weingarten, Inc.*, 420 U.S. 251, 265-266 (1975) ("To hold that the Board's earlier decisions froze the development of this important aspect of the national labor law would misconceive the nature of administrative decisionmaking"). See also *Bill Johnson's Restaurants, Inc.* v. *NLRB,* 461 U.S. 731, 742 (1983). Cf. *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 863-864 (1984) ("An initial agency interpretation is not instantly carved in stone. On the contrary, the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis").

Deference is fully due the Board's empirical judgments that "fashion generalized rules in light of its experience" (*Beth Israel Hosp.*, 437 U.S. at 500). The Board's "[e]veryday experience in the administration of the statute gives it familiarity with the circumstances and backgrounds of employment relationships in various industries, with the abilities and needs of the workers for self-organization and collective action, and with the adaptability of collective bargaining for the peaceful settlement of their disputes with their employers" (*NLRB* v. *Hearst Publications, Inc.*, 322 U.S. 111, 130 (1944)). And the Board's " '[c]umulative experience' begets understanding and insight by which judgments not objectively demonstrable are validated or qualified or invalidated" (*NLRB* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 349 (1953)). This Court has, accordingly, given substantial deference to the Board's empirical judgments, as the agency seeks to "apply[] the Act's general prohibitory language in the light of the infinite combinations of events which might be charged as violative of its terms" (*Republic Aviation Corp.* v. *NLRB,* 324 U.S. 793, 798 (1945)). See, *e.g.*, *id.* at 803-804; *Beth Israel Hosp.*, 437 U.S. at 500-501. Cf. *NLRB* v. *Baptist Hosp., Inc.*, 442 U.S. 773, 789 (1979) ("the development of * * * presumptions is normally the function of the Board").

Deference is also required when the Board's decisions are based on policy judgments designed to effectuate the broad purposes of the statute. "It is the Board on which Congress conferred the authority to develop and apply the fundamental national labor policy," and if the Board is to accomplish that task it "necessarily must have authority to formulate rules to fill the interstices of the broad statutory provisions." *Beth Israel Hosp.*, 437 U.S. at 500-501. Particularly where the Board's policy judgment reflects the agency's " 'difficult and delicate responsibility' of reconciling conflicting interests of labor and management," that judgment "is 'subject to limited judicial review' " (*NLRB* v. *J. Weingarten, Inc.*, 420 U.S. 251, 267 (1975)). "The rule which the Board adopts is judicially reviewable for consistency with the Act, and for rationality, but if it satisfies those criteria, the Board's application of the rule, if supported by substantial evidence on the record as a whole, must be enforced." *Beth Israel Hosp.*, 437 U.S. at 501.

B. Under These Principles, The No-Presumption Rule Should Be Upheld

1. The no-presumption rule reflects a rational empirical judgment about the union sentiments of striker replacements

As the Board explained in *Station KKHI*, "presumptions should arise when it is believed that proof of one fact renders the inference of the existence of another fact so probable that it is sensible and timesaving to assume the truth of the inferred fact until it is affirmatively disproved" (Pet. App. 74a). Guided by that principle, the Board in *Station KKHI* revisited the question whether persons who cross the picket line during an economic strike must be presumed to oppose the incumbent union. The Board "carefully reviewed [its] past decisions and assessed

[its] experience to determine if they suggest generalizations about the views of permanent strike replacements that are so universal that they support one overall presumption that can be applied when evaluating a union's majority status" (*ibid.*). The Board concluded that no such "universal" generalizations could be drawn. It reasoned that a striker replacement "may be forced to work for financial reasons, or may disapprove of the strike in question but still desire union representation and would support other union initiatives" (*id.* at 75a). The Board therefore found the so-called Gorman presumption—imposed by the court below—"not factually compelling" (*ibid.*).

The Board's empirical judgment is entirely rational. Persons may cross a picket line for any number of reasons, some of which do not suggest opposition to the incumbent union. For example, strikes can exact a severe economic toll from those who participate in them. "[A] striking individual faces an immediate and often total drop in income during a strike" (*Lyng* v. *International Union, United Automobile Workers*, 108 S. Ct. 1184, 1192 (1988)). Both strikers and potential replacements may be moved by economic need to work for a struck employer. "[T]he specter of hardship to * * * family" (*NLRB* v. *Granite State Joint Board*, 409 U.S. 213, 217 (1972)) may therefore cause persons to cross a picket line even though they otherwise support the union and the balance of the union's agenda. See, *e.g.*, *International Union*, 108 S. Ct. at 1189 nn. 3, 4. Moreover, strikes are, by their nature, controversial, and "in virtually every strike situation there will be some employees who disagree with their union's decision" and "either refuse[] to strike or abandon[] the strike." *Trans World Airlines, Inc.* v. *Independent Federa-*

tion of Flight Attendants, 109 S. Ct. 1225, 1232 (1989). Thus even when a worker's refusal to participate in a strike represents a profound disagreement with the union's strategy and tactics at that time, that disagreement may not endure, and may not signify a fundamental opposition to union representation. It is not unreasonable to suppose that replacement workers, like the workers they replace, are often motivated by such considerations, and would also value union representation at the conclusion of the strike. Cf. *Gilpin* v. *AFSCME,* 875 F.2d 1310, 1313 (7th Cir. 1989) (class action certification not appropriate because there are "[t]wo distinct types of employees" who decline to join a union: those who are ideologically opposed, and those free riders who are "happy to be represented by a union" but who do not want to pay for its services).[9]

[9] It is true that replacements generally know that the union's primary allegiance is to the striking employees and indeed may be attempting to secure the replacements' discharge. However, as the Board noted in *Dold Foods, Inc.,* 289 N.L.R.B. No. 156 (July 28, 1988), in declining to presume that replacements oppose the union (slip op. 3 (footnote omitted)):

> Unions often demand, at least in the first instance, that the replacements be discharged and the strikers rehired. Frequently, as in the instant case, the union's position may be modified in the course of the negotiations on the issues underlying the strike. Indeed, in the instant case, as the strike wore on, the Union took a progressively weaker position until, at the bargaining session of October 23, it requested only that the Respondent discharge those replacements (about 32 out of 201 total replacements) who had not yet completed the probationary period.

See also *NLRB* v. *Pennco,* 684 F.2d at 342 (since less than half of the replacements would lose their jobs if the strike were settled, there was "no indication" that any particular replacement feared loss of employment).

Because the reasons for crossing a picket line vary from industry to industry, from strike to strike, and from worker to worker, the Board plainly acted rationally in refusing, as an empirical matter, to allow an employer to invoke a presumption that striker replacements oppose the incumbent union. The present case illustrates the wisdom of the Board's determination. As Judge Williams noted in dissent, of the 15 replacement workers interviewed by respondent's personnel director, only one "volunteered any animus toward or opposition to the Union" (Pet. App. 23a-24a & n.8). "The failure of most replacement employees to state an opinion either way lends credence to the Board's position that these workers should not be presumed to be for or against the Union" (*id.* at 23a-24a n.8). See also *Hajoca Corp.* v. *NLRB,* 872 F.2d 1169, 1174-1175 (3d Cir. 1989).

2. The no-presumption rule reasonably promotes the stability of collective-bargaining relationships, without impairing the right of employees to select their bargaining representatives

"The overriding policy of the NLRA is 'industrial peace.' " *Fall River Dyeing,* 482 U.S. at 38. Accord *NLRB* v. *Financial Institution Employees, Local 1182,* 475 U.S. 192, 202-203 (1986). Indeed, as the Court explained in *Fall River Dyeing*, the presumption of a union's majority status following its certification is "based not so much on an absolute certainty that the union's majority status will not erode following certification, as on a particular policy decision"—the policy of " 'promot[ing] stability in collective-bargaining relationships, without impairing the free choice of employees.' " 482 U.S. at 38 (citation omitted; brackets in original). As the Court noted, the presumptions of continued majority support—irrebuttable during the first year, and rebuttable thereafter—

"enable a union to concentrate on obtaining and fairly administering a collective-bargaining agreement without worrying that, unless it produces immediate results, it will lose majority support and will be decertified." *Ibid.* Moreover, the presumptions "remove any temptation on the part of the employer to avoid good-faith bargaining in the hope that, by delaying, it will undermine the union's support among the employees." *Ibid.* "The upshot of the presumptions," the Court concluded, "is to permit unions to develop stable bargaining relationships with employers, which will enable the unions to pursue the goals of their members, and this pursuit, in turn, will further industrial peace." *Id.* at 38-39.

The no-presumption rule for gauging the union sentiments of striker replacements promotes the same purposes. By requiring the employer to establish the replacements' views on a case-by-case basis, the no-presumption rule limits the employer's ability to oust an incumbent union simply by replacing a sufficient number of its members. Only by demonstrating that the replacements are actually opposed to the union may an employer carry his burden of proving a good-faith doubt of majority status. The no-presumption rule is thus in harmony with the overall rebuttable presumption of continued majority support for the union, and accordingly furthers the interest in bargaining stability.

By contrast, the Gorman presumption, adopted by the court below, would disserve the policy of stable bargaining relationships in two respects. First, it would discourage employers from engaging in good-faith bargaining with the union, see *Fall River Dyeing,* 482 U.S. at 38; by inviting a strike, employers would be creating an opportunity to hire striker replacements who would be presumed to be anti-union. And once a strike had begun, the Gorman

presumption would discourage employers from reaching settlements with the incumbent union, encouraging them instead "to withdraw from bargaining upon the mere addition of the requisite number of permanent replacements to the payroll." Flynn, *The Economic Strike Bar: Looking Beyond The "Union Sentiments" Of Permanent Replacements,* 61 Temple L. Rev. 691, 706 (1988). Second and relatedly, by relieving the employer of the burden of coming forth with evidence that the striker replacements actually oppose the union, the Gorman presumption would make it easier for an employer to justify a withdrawal of recognition. The Gorman presumption thereby increases the chances that the incumbent union would be ousted by the employer once the strike began.[10]

The interest in bargaining stability—promoted by the no-presumption rule, but strongly disserved by the Gorman presumption—is vitally at stake in the context of an economic strike. Strikes are "part and parcel of the system

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[10] As in the present case, employers sometimes hire more replacements than strikers, asserting concerns over inexperience or anticipated attrition; it is particularly important to assure that those decisions are not made for the purpose of unseating the union. See Flynn, *The Economic Strike Bar: Looking Beyond the "Union Sentiments" of Permanent Replacements,* 61 Temple L. Rev. 691, 692 n.7, 705 (1988) (noting increased willingness of employers to hire permanent replacements and the opportunity this provides to "oust" union). See also Weiler, *Striking a New Balance: Freedom of Contract and the Prospects for Union Representation,* 98 Harv. L. Rev. 351, 362, 390 (1984). The willingness of some employers to oust a union is reflected in cases in which the Board has found a violation based on the hiring of excessive replacements for the purpose of depriving strikers of reinstatement rights. See *Magic Chef, Inc.,* 286 N.L.R.B. No. 33 (Mar. 31, 1986), slip op. 21-22. See also *Kurz-Kasch, Inc.,* 286 N.L.R.B. No. 131 (Nov. 30, 1987), slip op. 42-47, remanded, 865 F.2d 757 (6th Cir. 1989) (discriminatory failure to reinstate strikers as vacancies occurred); *Laher Spring & Electric Car Corp.,* 192 N.L.R.B. 464, 464-466 (1971).

that the Wagner and Taft-Hartley Acts have recognized" (*NLRB* v. *Insurance Agents' Int'l Union,* 361 U.S. 477, 489 (1960)), and Congress intended them to be part of collective bargaining, not the engine of its destruction.[11] Where economic strikers have been permanently replaced, however, the post-strike union—as in the successorship situation considered in *Fall River Dyeing*—"is in a peculiarly vulnerable position" (482 U.S. at 39).[12] Because the workforce, and the sentiments of the employees, are in a state of flux, the post-strike union cannot be certain whether it will command sufficient support to continue as the exclusive representative. "[D]uring this unsettling transition period" (*ibid.*), the no-presumption rule reduces the employer's incentive to stonewall negotiations, and limits the employer's ability to oust the union by the simple expedient of replacing its membership.[13]

Even as it promotes the stability of the bargaining relationship, the Board must also be responsive to the " 'free choice' of employees" in selecting or rejecting a bargaining

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[11] As one commentator has put it (Estreicher, *Strikers and Replacements,* 38 Lab. L. J. (CCH) 287, 288 (1987)):

> [W]hile economic conflict is an essential, legitimate feature of our collective bargaining system, a strike should ordinarily not provide an occasion for terminating the bargaining relationship. The strike is a means of resolving a dispute, not destroying the underlying bargaining structure. * * *
>
> [W]e are dealing with a form of limited warfare, cabined by a set of rules to make sure that the relationship survives the conflict.

[12] The present case illustrates that vulnerability. At the conclusion of the strike, when the Union capitulated and agreed to accept respondent's May 25 contract offer, respondent nevertheless refused to renew that offer and instead withdrew recognition from the Union.

[13] Congress's 1959 amendment of Section 9(c)(3) of the Act, 29 U.S.C. 159(c)(3), reflects the statutory policy of encouraging stability

representative (*Fall River Dyeing*, 482 U.S. at 38). The no-presumption rule is fully consistent with that objective. Although the rule does not entitle an employer automatically to treat replacements as union opponents, the employer remains free to marshal evidence concerning the replacements' sentiments, and thereby to establish its good-faith doubt of the union's majority status.[14] Similarly, the employees "are not powerless to reject a union that they believe no longer commands their support" (*id.* at 50 n.16). All employees, including striker replacements, are free to invoke the Board's election procedures during or after a strike by filing a decertification petition. See *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 613 (1969).[15]

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in the bargaining unit. Prior to 1959, Section 9(c)(3) provided that "[e]mployees on strike who are not entitled to reinstatement shall not be eligible to vote" for a bargaining representative. Characterizing that provision as "an unfair, 'union busting' rule," that could be used " 'to destroy a union' during an economic strike" (*Legislative History of the Labor-Management Reporting and Disclosure Act of 1959*, at 427-429, 452, 1064-1065, 1070, 1138 (GPO 1959)), Congress in 1959 amended Section 9(c)(3) to permit replaced economic strikers to vote in any election conducted within 12 months after commencement of the strike. The no-presumption rule regarding striker replacements is consistent with Congress's evident desire to foster continuity and stability in the bargaining relationship during the course of an economic strike. See *C.H. Guenther & Son, Inc.*, 174 N.L.R.B. 1202, 1203 (1969), enforced, 427 F.2d 983 (5th Cir.), cert. denied, 400 U.S. 942 (1970); *NLRB* v. *Crimptex, Inc.*, 517 F.2d 501, 504 (1st Cir. 1975).

[14] For a summary of instances in which such a showing has been made in the past, see R. Gorman, *Labor Law* 110-111 (1976).

[15] If the petition is supported by a majority of the bargaining unit, it will probably justify the employer's withdrawal of recognition. See

3. *The no-presumption rule assures that the statutory right to strike will not be unduly chilled by a threat that the union will lose recognition*

Section 13 of the Act, 29 U.S.C. 163, states that "[n]othing in this subchapter, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike * * *." The Act's "solicitude for the right to strike is predicated upon the conclusion that a strike when legitimately employed is an economic weapon which in great measure implements and supports the principles of the collective bargaining system." *NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221, 223-234 (1963). To be sure, this "solicitude for the right to strike" does not immunize strikers from all adverse consequences, for the employer is entitled to use economic weapons of its own. Thus, in the interests of carrying on its business during an economic strike, an employer may permanently replace its striking workers, *NLRB* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, 345-346 (1938), and may use the lockout offensively, *American Ship Building Co.* v. *NLRB*, 380 U.S. 300, 310 (1965), even though such tactics may diminish the effectiveness of a strike.

Automated Business Systems v. *NLRB*, 497 F.2d 262, 270 n.6 (6th Cir. 1974). If supported by a 30% showing, it will ordinarily trigger a Board election. See *Retired Persons Pharmacy* v. *NLRB*, 519 F.2d 486, 490 (2d Cir. 1975) ("When an employer refuses to engage in collective bargaining allegedly in defense of the rights of his employees, it is proper for the Board to strike the balance differently from the situation when the employees themselves assert their own rights and demand a decertification election.") Cf. *Fall River Dyeing*, 482 U.S. at 50 n.16 (disapproving employer's reliance on employees' rights in justifying refusal to bargain); *NLRB* v. *Frick Co.*, 423 F.2d 1327, 1334-1335 (3d Cir. 1970).

Forging the appropriate balance between these competing economic weapons is one of the Board's central tasks. It is the Board, and not the courts, that must "weigh[] the interests of employees in concerted activity against the interest of the employer in operating his business in a particular manner" (*NLRB* v. *Erie Resistor Corp.*, 373 U.S. at 229). Thus, in *Erie Resistor*, the Court upheld the Board's judgment that an offer of superseniority to replacement employees and crossovers was unlawful, noting that "[s]uper-seniority renders future bargaining difficult, if not impossible, for the collective bargaining representative" (*id.* at 231). And the Court emphasized that striking the appropriate balance is the Board's responsibility, in light of its "special understanding of 'the actualities of industrial relations' " (*id.* at 236).

Performing that function in *Station KKHI*, the Board reasonably concluded that adopting the Gorman presumption "would disrupt the balance of competing economic weapons long established in strike situations and substantially impair the employees' right to strike by adding to the risk of replacement the risk of loss of the bargaining representative * * *" (Pet. App. 75a-76a). As a practical matter, the Board noted, the Gorman presumption would allow employers to terminate a bargaining relationship whenever a strike occurs, simply by hiring sufficient permanent replacements to constitute a majority of the unit.

If adopted, the Gorman presumption would therefore threaten striking workers with more than the risk of job loss. Although employees know that they risk being permanently replaced when they undertake an economic strike, they also know that many strikes ultimately result in a strike settlement agreement that entitles the strikers to reclaim their jobs. See *Belknap, Inc.* v. *Hale*, 463 U.S.

491, 503-504 (1983).[16] If employers are permitted to cease recognizing the union during a strike once they have hired sufficient permanent employees to doubt the union's majority status, the employees may lose not only their jobs, but also a representative to negotiate a satisfactory strike settlement. And once the strike has ended, the loss of a bargaining representative diminishes the chances that strikers—who remain employees under the statute—will be notified of vacancies when they occur, and restored to their positions. See *NLRB* v. *Fleetwood Trailer Co.*, 389 U.S. 375 (1967); *Laidlaw Corp.*, 171 N.L.R.B. 1366 (1968), enforced, 414 F.2d 99 (7th Cir. 1969), cert. denied, 397 U.S. 920 (1970); 29 U.S.C. 152(3) ("employee" includes "any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute").[17]

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[16] As Professor Estreicher has noted, a strike is a "period in flux, when the status of both replacements and strikers has yet to be fixed because the strike has not ended, and much will turn on the manner in which the strike is settled." 38 Lab. L. J. (CCH) at 293. See also *Flynn*, 61 Temple L. Rev. at 705-706.

[17] The termination of an economic strike may generate a variety of other issues that the union can play an instrumental role in resolving. Once reinstated, strikers are entitled to receive all former rights and privileges as employees, including seniority. *Erie Resistor*, 373 U.S. at 233. They may need the union to realize those rights when reinstated. Other questions may arise as to (1) whether striker replacements are "permanent," and thus whether strikers are entitled to an immediate offer of reinstatement (see, *e.g.*, *NLRB* v. *Murray Products, Inc.*, 584 F.2d 934, 938-939 (9th Cir. 1978)); (2) whether the employer's offer of reinstatement was invalid, either because the reinstatement or the offer itself was improperly conditional (see, *e.g.*, *NLRB* v. *Great Dane Trailers, Inc.*, 388 U.S. 26, 27-32 (1967); *NLRB* v. *Erie Resistor Corp.*, 373 U.S. at 223, 225); (3) whether strikers have forfeited reinstatement due to misconduct (see, *e.g.*, *Allied Indus. Workers, Local 289* v. *NLRB*, 476 F.2d 868, 878-881 (D.C. Cir. 1973)); or (4) whether limited jobs, promotional opportunities, or other benefits belong to strikers, replacements, or crossovers (see, *e.g.*, *Trans World Airlines, Inc.* v. *Independent Federation of Flight Attendants*, 109 S. Ct. 1225 (1989); *Belknap, Inc.* v. *Hale*, 463 U.S. 491 (1983); *Randall, Div. of Textron, Inc.* v. *NLRB*, 687 F.2d 1240, 1241-1249 (8th Cir. 1982), cert. denied, 461 U.S. 914 (1983)). The absence of a union may mean, as a practical matter, that such often complex issues may not be resolved properly or, indeed, raised at all by unrepresented employees.

Threatening strikers with a loss of their representative, as well as their jobs, greatly enhances the risks of an unsuccessful strike. As long as the union remains the representative of the bargaining unit, the striking employees, upon their ultimate return to work, will obtain whatever benefits the union is able to secure, and may continue their collective efforts. If, on the other hand, an unsuccessful strike carries with it the likely loss of representation, the strike becomes not just one battle in an ongoing contest, but potentially a total defeat—one that concludes the contest with a loss of the bargaining relationship. That added risk is likely to chill the exercise of the right to strike.

* * * * *

An employer's withdrawal of a union's recognition as bargaining representative is not simply the use of an "economic weapon"; it is an attempt to revoke a status conferred on the representative by law in order to effectuate the policies of the Act. Thus the question of the appropriate grounds for withdrawal is one on which the Board's expert judgment is especially entitled to deference.

In the present case, the Board has exercised its judgment by declining to allow invocation of the Gorman presumption and by following instead a no-presumption rule. That determination—based on both empirical and policy grounds—is entirely reasonable, and the decision of the

court of appeals, resting solely on its own preference for the Gorman presumption, should be reversed.[18]

[18] A preference for the Gorman presumption does not, of course, justify a departure from the no-presumption rule adopted by the Board. As this Court has explained, "[w]here the Board's construction of the Act is reasonable, it should not be rejected 'merely because the courts might prefer another view of the statute.' " *Pattern Makers' League of North America* v. *NLRB*, 473 U.S. 95, 114 (1985).

The court of appeals also seems to have misunderstood the way in which the no-presumption rule operates. The court surmised that the no-presumption rule "has the same effect as the presumption that striker replacements support the union in the same ratio as the employees they replace" (Pet. App. 9a). As Judge Williams explained in dissent (*id.* at 17a), however, the two standards operate quite differently. To be sure, under the no-presumption rule the employer must still overcome the general rebuttable presumption that the union enjoys majority support. But unlike the Board's prior standard, the no-presumption rule does not require the employer to overcome the additional "presumption that the replacement workers * * * support the union" (*ibid.*). See also *Hajoca Corp.* v. *NLRB*, 872 F.2d 1169, 1174-1175 (3d Cir. 1989) ("*Station KKHI* removed the employer's initial hurdle of having to come forward with evidence sufficient to show that replacement workers did not support the union, and then further evidence to carry its burden to show an objective basis for a good faith doubt"). The court of appeals' failure to recognize the practical differences between the Board's present and prior standards apparently contributed to the court's unwillingness to accept the no-presumption rule in this case.

CONCLUSION

The judgment of the court of appeals should be reversed.

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QUESTIONS PRESENTED

Whether the Board's *Station KKHI* rule, which for purposes of the good faith doubt test denies any probative weight to evidence that the employer has hired a new work force of permanent replacements and requires the employer to prove that the replacements were actually opposed to the Union, is arbitrary and capricious and is not rational.

Whether, as found by the Fifth Circuit, for purposes of the good faith doubt test, an employer may reasonably doubt that permanent replacements support the Union.

Whether the Board's decision that when CMS withdrew recognition, CMS lacked a reasonable good faith doubt concerning the Union's majority support among CMS's employees, is supported by substantial evidence in the record when considered as a whole.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 88-1685

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

CURTIN MATHESON SCIENTIFIC, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENT

STATEMENT

Following a Board election on April 15, 1970, Teamsters Local 968 ("Union") was certified as the bargaining representative for a unit of warehouse employees of Respondent, Curtin Matheson Scientific, Inc. ("CMS" or "Company"). J.A. 8, 126-127 [Tr. 7, Tr. 7].[1] During the

1. All dates are 1979 unless otherwise stated. References to pages in the Joint Appendix are designated "J.A." Citations to exhibits are followed by two additional transcript references to the point of offer into evidence and acceptance by the ALJ, which will be placed in

following nine years, the Union and CMS entered into a series of collective bargaining agreements, the latest of which was a three-year contract that expired on May 21, 1979. J.A. 46, 75.

The parties commenced negotiations on May 2nd, and in a meeting on May 25th, CMS made its best offer to the Union. J.A. 79, 134-135 [Tr. 7, Tr. 7]. The Union rejected the offer on May 29th. J.A. 79, 135 [Tr. 7, Tr. 7]. CMS attempted to break the stalemate on June 4th by effecting a lockout, the legality of which the Board stipulated. J.A. 21; Pet. App. at 48. During the lockout (as well as the early part of the strike that followed) CMS operated the warehouse using its managerial and professional employees. J.A. 26, 57.

At a meeting with the Union on June 12th, CMS terminated the lockout and renewed its May 25th offer. J.A. 79, 134-135 [Tr. 7, Tr. 7]. Once again, however, the Union rejected the offer, choosing instead to commence a strike the following day, June 13th. J.A. 21, 79, 135 [Tr. 7, Tr. 7].

Five bargaining unit employees, who were not members of the Union, immediately crossed the picket line and reported to work. J.A. 47; Pet. App. at 27a. Two of these crossovers volunteered to CMS management their strong disapproval of the strike and the Union. J.A. 26-29, 135. Moreover, during the course of the strike, several other unit employees, including the current Chief Shop Steward and negotiating committee member, Shady Goodson, and

brackets. *e.g.* J.A. 100 [51, 51]. When reference is made to portions of the hearing transcript that were not included in the Joint Appendix, the page references will be preceded by "Tr." All exhibits in the Joint Appendix pages 112-137 (inclusive) were offered and admitted at page 7 of the hearing transcript. Reference to exhibits that are not included in the Joint Appendix will be designated "General Counsel's Exhibit" or "Respondent's Exhibit."

the former Shop Steward, J. R. Blackshire, crossed the picket line and informed CMS that neither they nor the unit employees wanted to participate in the strike, and that they no longer supported the Union. J.A. 29-30, 31-33, 144, 145 [85, 147].

According to Goodson, the strike had been called contrary to the wishes of the employees, in order *to satisfy a personal vendetta of Union Business Agent, Howard Reed,* who had been assigned to the CMS contract during 1977 and subsequently acted as the Union's Chief Spokesperson during the 1979 contract negotiations.[2] J.A. 145 [85, Tr. 147].

On June 25th CMS hired twenty-nine replacements.[3]

2. Administrative Law Judge Bennett, (hereinafter "ALJ") specifically found that Shady Goodson reported to CMS spokesperson and Director of Employee Relations, Elizabeth Price, that "the employees felt the strike was based on the hostility of the Union's Business Agent, Howard Reed." Pet. App. at 52a & n.7. *Compare* Pet. App. at 28a ("only the Union wanted the strike").

3. The Board's Brief suggests that CMS's decision to hire 29 replacements for 22 strikers was suspicious. Brief for Petitioner at 21 n.10. It was neither alleged nor argued, however, that the hiring of 29 replacements was improper. Indeed, it was acknowledged by the ALJ that this level of hiring was "understandable," and the Board, in its decision, did not voice disagreement. Pet. App. at 30a, 50a. CMS proved to be correct in anticipating immediate turnover. By July 20th, the number of replacements had dwindled to 25. J.A. 62. And on closer examination, it appears that CMS's decision to hire 29 replacements reflected sound business judgment. In this regard, CMS's lockout strategy, which was designed to cause the Union to accept the May 25th offer, was unsuccessful. During the lockout, CMS used its managerial and professional employees to perform the work of the bargaining unit. J.A. 26, 57. Once the lockout ended and the strike commenced on June 13th, *only five* bargaining unit employees reported to work. J.A. 47-50, 135. Thus, even after the lockout, the strike was very successful, leaving CMS in an extremely vulnerable position. Given the effectiveness of the strike and the obvious need to return the professional and managerial employees to their normal duties, CMS's decision to hire a sufficient number of new employees to allow for inefficiency and turnover was certainly

J.A. 61, 135. Elizabeth Price personally told each replacement that he or she was a "permanent replacement." J.A. 103-104. After they were hired, the permanent replacements had to cross a hostile picket line to report for work. J.A. 135.

During the three weeks that followed the hiring of the replacements, there was no communication between the Union and CMS. J.A. 136. Moreover, from June 25th until July 20th, the date upon which CMS withdrew recognition, the Union made no attempt to contact any of the permanent replacements. Pet. App. 30a. The Union's lack of interest in the replacements was mirrored by the replacements' lack of interest in the Union in that no evidence suggests that the permanent replacements ever attempted to contact the Union.[4]

By June 28th, the three men who represented the present and immediate past Union leadership from among the bargaining unit employees had either openly repudiated the Union, abandoned the strike, or both. J.A. 34-35.

By July 19th, four strikers, including Chief Steward Shady Goodson, announced their decisions to withdraw from the Union, to resign, or to retire. J.A. 144, 147. Along with these announcements came statements from

"understandable." Pet. App. at 50a. Moreover, had CMS's motives for hiring the replacements been insincere, it could have withdrawn recognition from the Union when the number of replacements was at its greatest, but it did not.

4. In its Brief *amicus curiae* at 18, the AFL-CIO laments that the replacements "in all probability" will know little and will be told nothing by the employer about the "circumstances that gave rise to the strike." Of course, the union can undertake to explain these issues to the replacements orally and in writing as they come and go daily across the union's picket line. But given the inherent conflict between the union and the replacements and the "hostility" that is typical of such daily confrontations (J.A. 135), an effort by the union to open such a dialogue with the replacements would be futile.

two of the four that their decisions were motivated by their dissatisfaction with the Union. J.A. 27-28, 149 [142, 147].

On July 16th, the Union sent two telegrams to CMS: the first requested reinstatement on behalf of all striking employees. Pet. App. at 29a; General Counsel's Exhibit 13 [Tr. 185, Tr. 186]; the second advised of the acceptance of CMS's May 25th offer. J.A. 128. Three days later, on July 19th, replacement worker Tim Hartman voluntarily reported to Price that he had heard a rumor that the replacements were to be laid off so that the strikers could return to their former positions. J.A. 98-99, 165 [Tr. 166, Tr. 166].

On July 20th, CMS informed the Union that it doubted the Union's majority, withdrew recognition, and invited the Union to file a petition for an election if the Union believed it had majority support. J.A. 130.

Significantly, none of CMS's actions, other than its withdrawal of recognition and subsequent refusal to bargain with the Union, was alleged to have been unlawful.[5]

5. It is not surprising that the evidence in the record may be incomplete on points now deemed relevant by the Board. Because the events giving rise to CMS's decision to withdraw recognition from the Union occurred more than a decade ago, particular attention must be paid to the dates upon which important Board and court pronouncements occurred, so that knowledge concerning such pronouncements is not unfairly imputed to CMS. Most significant among these is the Board's decision in *Station KKHI*. The Board's General Counsel tried this case under the now-discredited *Penasco* presumption; *i.e.*, "the replacements are presumed to support the union in the same ratio as did the former employees." J.A. 93. Even *Station KKHI* was tried on that theory. Pet. App. at 86a. Consequently, the Board *sua sponte* adopted the no-presumption rule, which was neither advocated nor opposed by the General Counsel, CMS or any other party.

SUMMARY OF ARGUMENT

The question presented to this Court is not whether the Board may refuse to apply any presumption regarding the extent of union support among permanent replacements, but whether the Board's no-presumption approach is consistent with the National Labor Relations Act. The practical effect of the Board's no-presumption rule is to obligate an employer to recognize as the exclusive bargaining representative a union whom a majority of employees have never expressed a willingness to accept. This new Board approach thus is irrational because it measures the quantum of proof necessary to satisfy the Board's own good faith doubt standard without appropriately giving probative weight to the fact that a company has hired an entirely new work force of permanent replacements.

I. The Board's no-presumption approach adopted in *Station KKHI*, Pet. App. 62a, and applied in this case is irrational for at least three reasons. First, the Board's inability to determine the union sentiments of permanent replacements is inconsistent with industrial realities. The Board itself long has recognized that permanent replacements who cross the picket line to take jobs vacated by strikers would not support the incumbent union. In this regard, the interests of economic strikers and replacements are diametrically opposed, with the union's loyalty lying with the strikers. Likewise, the replacements, recognizing the instability of their job tenure and the union's adverse interests, would not choose the union as their representative.

Second, the Board's no-presumption approach departs significantly from this Court's precedent which recognizes that for purposes of collective bargaining, replacement

workers do not support the union and should not be counted toward the union's majority. *See, e.g., NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240 (1949). Moreover, the Board wholly has failed to articulate any rational basis for its departure from this established principle.

Third, the Board's no-presumption approach is inconsistent with the legislative history of the National Labor Relations Act. While the policy considerations differed under the Taft-Hartley Act of 1947 and the Labor-Management Reporting and Disclosure Act, Congress nevertheless contemplated that permanent replacements would not support the incumbent union. The Board has failed to reconcile its no-presumption approach with this explicit congressional recognition.

II. For at least four decades the Board has recognized that to justify withdrawal of recognition from an incumbent union following the certification year, an employer need only demonstrate a reasonably-based *good faith doubt* that the union enjoys majority support. In recent years, however, the Board has demonstrated a drastic departure from its own articulated policy. Since its *Station KKHI* decision, the Board has not once found the good faith doubt standard satisfied in cases involving striker replacements. In fact, it now appears that an employer must satisfy the more onerous burden of proving minority-in-fact, even if a good faith doubt has been established.

Indeed, as one court recently noted, there is now "little difference between the evidence necessary to prove a union's minority in fact and the employer's reasonable good faith doubt." *Mingtree Restaurant, Inc. v. NLRB*, 736 F.2d 1295, 1297 (9th Cir. 1984). The Board's own

Brief in this case states that "[o]nly by demonstrating that the replacements are actually opposed to the union may an employer carry his burden of proving a good faith doubt of majority status." Brief for Petitioner at 20. Not only has the Board failed to articulate reasons for its departure from the good faith doubt standard, but it disingenuously pays lip service to a policy that it has, in effect, abandoned. Such a departure is arbitrary as a matter of law. *Atchison, T. & S.F. Ry. v. Wichita Bd. of Trade,* 412 U.S. 800, 808 (1973). Under a proper application of the good faith doubt test, there is sufficient evidence in this record upon which CMS reasonably based such a doubt. The Board's decision to the contrary is, therefore, not supported by substantial evidence in the record as a whole.

III. The Board's policy arguments in support of its no-presumption rule are fallacious and should be rejected. Contrary to the Board's assertions, a presumption that replacements do not support the incumbent union would not necessarily result in a loss of the bargaining representative. If an employer establishes a good faith doubt, a union may easily invoke the Board's election process, which has been characterized by the Board as the "most satisfactory" means to determine a union's majority. *Stoner Rubber Co.,* 123 N.L.R.B. 1440, 1445 (1959). If the union remains the majority choice of the employees, the employer is obligated to recognize the bargaining agent, and the Board's doomsday scenario is averted; if the union is in fact no longer the choice of a majority of the employees, then the employer properly and in good faith has refused to bargain with the minority. This result is entirely consistent with the National Labor Relations Act.

ARGUMENT

I.

The Board's No-Presumption Rule For Assessing Union Support Among Permanent Replacements Lacks Rationality And Is Inconsistent With The National Labor Relations Act

The only factually compelling view about permanent replacements' union sentiments, which is consistent with the National Labor Relations Act, 29 U.S.C. § 151, *et seq.* (1947) ("NLRA" or the "Act") and is supported by the decisions of this Court and the Board itself, is the traditional Board approach that permanent replacements do not support the union and that replacements should not be counted toward a union majority. *See* R. Gorman, *Labor Law* 112 (1976).[6] Congress, the courts, employers, organized labor, and the Board all have recognized that it is reasonable to assume that permanent replacements do not support the very union that seeks their ouster.

A. The Board's Traditional Recognition That Permanent Replacements Oppose The Incumbent Union Accurately Reflects The Actualities Of Industrial Relations.

The Board long has recognized that permanent re-

6. Professor Gorman did not state this proposition in terms of a "presumption." Rather, he stated the proposition in terms of an "assumption," which is precisely the language used in *Stoner Rubber Co.*, 123 N.L.R.B. 1440, 1444 (1959). Moreover, while the Fifth Circuit's decision referred to Professor Gorman's statement as the "Gorman Presumption," the court's holding was consistent with the Board's historical treatment of permanent replacements: "We hold that the Company was justified in doubting that the striker replacements supported the Union in this context." Pet. App. at 10a.

placements who cross a picket line to assume jobs vacated by strikers would not support an incumbent union. *See, e.g., Celanese Corp. of Am.*, 95 N.L.R.B. 664, 674 (1951) (108 replacements contributed to doubt); *Stoner Rubber Co.*, 123 N.L.R.B. at 1444 ("nor was it unreasonable to assume that none of the 18 permanent replacements were union adherents"); *Jackson Mfg. Co.*, 129 N.L.R.B. 460, 478 (1960) ("it is doubtful that the Union represented anything near a majority of the employees, unless it could be shown (as it was not) that the replacements hired during the strike had chosen the Union to represent it — *a most improbable situation*") (footnote omitted) (emphasis added); *Titan Metal Mfg. Co.*, 135 N.L.R.B. 196, 215 (1962); *S & M Mfg. Co.*, 172 N.L.R.B. 1008, 1008-1009 (1968) ("newly hired employees who had crossed the picket line to go to work . . . cannot be found [to be] union adherents"); *Beacon Upholstery Co.*, 226 N.L.R.B. 1360, 1368 (1976).[7]

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7. Various courts of appeals have also followed these holdings. *NLRB v. Randle-Eastern Ambulance Serv., Inc.*, 584 F.2d 720, 728 (5th Cir. 1978) (it is generally assumed that replacements do not support the union and ought not to be counted toward a union majority); *National Car Rental Sys., Car Rental Div. v. NLRB*, 594 F.2d 1203, 1207 (8th Cir. 1979) (permanent replacements assumed not to support the union and ought not to be counted toward a union majority); *Soule Glass & Glazing Co. v. NLRB*, 652 F.2d 1055, 1110 (1st Cir. 1981) (replacements are assumed not to support the union); *Whisper Soft Mills v. NLRB*, 754 F.2d 1381, 1388 (9th Cir. 1984) (citing *Randle-Eastern* with approval regarding assumption that replacements do not support union); *see also Phillip Carey Mfg. v. NLRB*, 331 F.2d 720, 734 (6th Cir.), *cert. denied*, 379 U.S. 888 (1964) ("In light of the large number of strikers who were permanently replaced, there would be substantial ground for doubt concerning the union's majority status."); *NLRB v. Alva Allen Indus.*, 369 F.2d 310, 316 (8th Cir. 1966) (assumption that replacements do not favor the union's representation leaves the union's majority status "open to fair doubt").

The foregoing cases (the "*Celanese/Stoner* line of cases"), which span twenty-five years, are based on the Board's recognition that it is reasonable to assume that replacements do not support the union.[8] The holding in these cases is that an employer may reasonably doubt that replacements support the union, and the effect of the holding is that replacements are not counted toward the union's majority. Moreover, in all of the above cases, except *Titan*, there were no *additional findings* such as picket line violence or demands for the ouster of the replacements, that accounted for the Board's treatment of such evidence.

The basis for the Board's traditional approach, which recognizes that permanent replacements oppose the incumbent union, is found in the "actualities of industrial relations." *NLRB v. United Steelworkers*, 357 U.S. 357, 362-364 (1958). Since its very creation, the Board has acknowledged that the interests of the economic strikers and the replacement workers are "diametrically opposed." *A. Sartorius & Co.*, 10 N.L.R.B. 493, 494 (1938); *Beacon Upholstery Co.*, 226 N.L.R.B. at 1368. As be-

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8. In *Station KKHI*, the Board overruled its line of cases, which held that replacements were presumed to support an incumbent union in the same proportion as the strikers. Pet. App. 62a-63a. In so doing, the Board in *Station KKHI* and *CMS* cited several cases from the *Celanese/Stoner* line of cases (Pet. App. 63a-70a), but mischaracterized their import. Rather than supporting the Board's contention that, prior to 1975 it had not engaged in presumptions regarding the union sentiments of permanent replacements, the *Celanese/Stoner* line of cases, for twenty-five years, assumed that replacements were not union adherents, and held that employers could doubt that the replacements supported the union. The Board's failure to reconcile its new "no-presumption" rule with the *Celanese/Stoner* line of cases is arbitrary and renders the Board's *Station KKHI* and *CMS* decisions entitled to no deference. *See, e.g., Atchison, T. & S.F. Ry. v. Wichita Bd. of Trade*, 412 U.S. 800, 808 (1973); *United Food and Commercial Workers Int'l Union v. NLRB*, 880 F.2d 1422, 1437 (D.C. Cir. 1989).

tween these two groups, the union's loyalty during a strike *always* lies on the side of the economic strikers. *See* Brief for Petitioners at n.9; *Station KKHI*, Pet. App. at 75a; Estreicher, *Strikers and Replacements*, 38 Lab. L. J. 287, 294 (1987) ("we know that in virtually *all cases* the union is not seeking to accomodate the rights of conflicting groups of workers but is acting out of an understandable, but *unremitting hostility* to the replacements") (emphasis added). Replacement workers, cognizant of their own job instability and the union's allegiance to the strikers, would, therefore, not support the incumbent union.

1. An Inherent Conflict Of Interest Exists Between The Incumbent Union And The Permanent Replacements.

From a striking union's standpoint, replacement workers who cross a picket line are seen as aligning themselves with management and against the union.[9] In union parlance, they are "scabs," a term that this Court has recognized as an "insult or epithet" reflecting the deep hostility between strikers and employees not supporting the union. *See Old Dominion Branch No. 496 v. Austin*, 418 U.S. 264, 283 (1974). Indeed, much of the picket line violence over the years has been "a product of, or response to, the hiring of replacement workers." Estreicher, *Strikers and Replacements*, 3 Lab. Law. 897 (1987). Organized labor has thus sought congressional assistance prohibiting employers' use of permanent replacements,[10] and has initiated various lobbying drives in support of enactment of state anti-replacement statutes.[11]

9. For example, in its *amicus* brief submitted to the Court in *Belknap, Inc. v. Hale*, the AFL-CIO acknowledged: "Viewing this falling out between an employer and individuals who had been allied with the employer in combatting a strike, and noticing immediately that the sole apparent effect of the decision below is to penalize an employer who hired permanent strike replacements, our instinctive reaction is to say, a 'plague o' both your houses.'" *Brief of the AFL-CIO as Amicus Curiae in support of Petitioner* at 1, *Belknap, Inc. v. Hale*, 463 U.S. 491 (1983) (No. 81-1966). As noted by the Court, the AFL-CIO also disavowed the contention that the union acted as representative of the replacements in negotiating the strike settlement. *Belknap*, 463 U.S. at 507 n.10.

Conversely, permanent replacements understand that their interests are antithetical to those of the strikers and the incumbent union. Just as it was in 1938, Judge Learned Hand's observation is true today: "most men [and women] taking jobs so made vacant [by strikers], realize from the outset how tenuous is their hold." *NLRB v. Remington Rand, Inc.*, 94 F.2d 862, 871 (2d Cir.), *cert. denied*, 304 U.S. 576 (1938). Although referred to as "permanent replacements," these workers realize from the beginning that they are in fact "non-permanent to the extent that a union may 'win' a strike

10. Before the House Labor Subcommittee on Labor-Management Relations, Richard L. Trumka, President of the United Mine Workers of America, urged Congress to amend the NLRA in order to prohibit "the hiring of permanent strike replacements." *Oversight Hearings on the Subject "Has Labor Law Failed" Before the Subcomm. on Labor-Management Relations of the Comm. on Education and Labor, 98th Cong., 2d Sess. 11 (1984)*. Likewise, James M. Kane, General President of the United Electrical, Radio and Machine Workers of America testified that "[e]conomic strikers should have the unrestricted right to return to their jobs at the end of a strike." *Id.* at 106.

11. Organized labor has succeeded in having a majority of states pass various "Strikebreaking Acts," which usually include one or more of the following provisions: "(a) restrictions on advertising for replacements, (b) prohibition of the use of 'professional strikebreakers,' (c) restrictions on the use of employment agencies to recruit replacements, and (d) restrictions on importation of replacements." Note, *Replacing Mackay: Strikebreaking Acts and Other Assaults on the Permanent Replacement Doctrine*, 36 Rutgers L. Rev. 861, 862 (1984). For a list of statutes and discussion of same, *see id.* at n. 11.

and force an employer to agree to a settlement that requires the reinstatement of striking employees." *Belknap, Inc. v. Hale,* 463 U.S. 491, 541-542 (Brennan, J., dissenting); *see also Station KKHI,* Pet. App. at 75a; *Leveld Wholesale, Inc.,* 218 N.L.R.B. 1344, 1350 (1975) ("[s]trike replacements can *reasonably foresee* that, if the union is successful, the strikers will return to work and the strike replacements will be out of a job") (emphasis added).

The interests of the striking union and those of the replacements are thus in direct conflict. It is a "legitimate bargaining demand," and indeed the union's primary goal "to get all the strikers back to work in preference to the replacements." *Belknap, Inc. v. Hale,* 463 U.S. 491, 532 (1983) (Brennan, J., dissenting) (citing *Portland Stereotypers' Union, No. 48 (Journal Publishing Co.),* 137 N.L.R.B. 782, 786 & n.6 (1962)); *see also Brief of AFL-CIO as Amicus Curiae in support of Petitioner* at 13 n.4, *Belknap, Inc. v. Hale* (No. 81-1966) ("It is common experience that unions seek to secure the reinstatement of *all* strikers") (emphasis added). Likewise, the overriding "concern" of the permanent replacements is "that in order to end the strike, the employer will agree with the union to reinstate the strikers at the replacements' expense." *Belknap,* 463 U.S. at 514, n.1 (Blackmun, J., concurring); *see also, Retail Clerks, Int'l Ass'n v. Lion Dry Goods, Inc.,* 369 U.S. 17, 28 (1962) (a strike settlement agreement "effect[s] the end of picketing . . . and restore[s] strikers to their jobs"). The replacement workers recognize that the union does not even have to "win" the strike in order for them to lose their jobs. Under many circumstances, the employer and the union may reach a back-to-work agreement that displaces the newly hired permanent re-

placements, or the "employer may unilaterally decide to permit such displacement." *TWA v. Independent Fed'n of Flight Attendants,* 109 S. Ct. 1225, 1233 (1989).

Consequently, it is reasonable to assume that the incumbent union would *not* be the choice of the replacements to serve as their bargaining representative. Just as "it is not logical to expect [a striking union] 'to negotiate in the best interests of permanent replacements' . . ." due to the "inherent conflict" between them, *Service Elec. Co.,* 281 N.L.R.B. 633, 639, 641 (1986) (quoting, *Leveld Wholesale,* 218 N.L.R.B. 1344-1350 (1975)), it is even less likely that replacement workers, cognizant of their tenuous job security and the union's adverse position, would accept the incumbent union to represent their interests.[12] *See* Flynn, *The Economic Strike Bar: Looking Beyond The "Union Sentiments" Of Permanent Replacements,* 61 Temp. L. Rev. 691, 705 (1988) (knowing that the

12. Moreover, the Board repeatedly has held that employers have no obligation to bargain with a striking union "concerning the continued employment terms of [striker] replacements." *Service Electric Co.,* 281 N.L.R.B. 633, 642 (1986); *see also Schmidt-Taigo Constr. Co.,* 286 N.L.R.B. No. 31 (Sept. 30, 1987); *Marbro Co.,* 284 N.L.R.B. No. 129, at 2 (July 24, 1987). The Board recognized that because of the "inherent conflict" between the interests of the permanent replacements and the striking union, the latter is unable "to bargain simultaneously in the best interest of both strikers and their replacements." *Service Electric Co.,* 281 N.L.R.B. at 641; *see also Leveld Wholesale,* 218 N.L.R.B. at 1350. In *Station KKHI,* however, the Board applies a wholly inconsistent principle and reaches the opposite result: it refuses to recognize that striker replacements evidence their rejection and repudiation of the union by crossing a picket line. This inconsistency between *Service Electric* and the decision below cannot be reconciled, and is arbitrary as a matter of law. *See, e.g., Atchinson, T. & S.F. Ry. v. Wichita Bd. of Trade,* 412 U.S. 800, 808 (1973); *United Food & Commercial Workers Int'l Union v. NLRB,* 888 F.2d 1422, 1437 (D.C. Cir., 1989) (reversing Board for its "failure to explain how it could reconcile the results that it approved in this case with the results contained in [other] Board decisions").

union may well be negotiating for their ouster, replacements are likely to oppose the union out of the simple desire to hold onto their positions). To believe otherwise would be to suggest that the chickens would favor the guardianship of the foxes.[13]

2. The Board's "No-Presumption Rule" Is Inconsistent With Prior Precedent And Is Not Factually Compelling.

The Board acknowledges that the "permanent replacements are typically aware of the Union's primary concern for the striker's welfare, rather than that of the replacements" and "indeed may be attempting to secure [the replacements'] discharge" and that "the replacements' attitude towards union representation may be influenced by this awareness. . . ." *Station KKHI*, Pet. App. at 75a; Brief for Petitioner at 18 n.9. Despite this recognition, the Board now contends that it is unable to discern *any* generalization about the union sentiments of the replacement workers. Brief of Petitioner at 16-17.[14]

13. In its *Belknap amicus curiae* brief, the AFL-CIO concedes the proposition that the striking union becomes more accommodative to the interests of the replacements in negotiating a strike settlement is at best "unrealistic" and the retention of any replacements simply represents "the maximum concession that the union was able to obtain from the employer." *Brief of the AFL-CIO as Amicus Curiae in support of Petitioner* at 13 n.4.

14. The Board's contention that *Station KKHI* creates a "no presumption" rule is disingenuous. Under *Station KKHI*, the Board includes replacements, strikers, and crossovers in the "expanded unit" and counts all such employees as union supporters until proven otherwise. Pet. App. at 6a, 31a n.10, 34a (only six out of fifty employees shown to oppose the union). As the Fifth Circuit observed, the Board in *Station KKHI* applied the general presumption of continuing majority with the same effect as the discredited *Pennco* presumption. Pet. App. 9a. CMS contends that the *Station KKHI* rule suffers from the same defects as the *Pennco* presumption and, as applied in this case, does not satisfy this Court's requirements for a valid presumption. *NLRB v. Baptist Hosp.*, 422 U.S. 773, 787 (1979).

Although purportedly based on a review of its past decisions[15] and an assessment of its experience, the Board fails to make any reference to the apparent changes in the attitudes of permanent replacements that would support what it presently sees to be the substantial possibility that such workers may desire representation from the very union that seeks their ouster.

The Board cites no support for its newly-adopted "no-presumption" rule. The Board relies on cases that relate to *strikers* who have abandoned the strike and crossed the picket line to return to work. *See, e.g., NLRB v. Granite State Joint Bd., Textile Workers Union of Am.*, 409 U.S. 213, 215 (1972) (employees who have resigned from the union and crossed the picket line); *TWA*, 109 S. Ct. at 1233 (employer not required to displace crossovers with more senior strikers). Unlike permanent replacements, crossovers merely are returning to their own jobs, not taking the jobs of strikers. Moreover, these returning strikers

15. In *Station KKHI*, Pet. App. at 75a n. 38, the only "past decisions" cited by the Board in support of its proposition that "the hiring of permanent replacements who cross a picket line, in itself, does not support the inference that the replacements repudiate the union as [their] collective bargaining representative" were *NLRB v. Frick Co.*, 423 F.2d 1327 (3d Cir. 1970) and *Rogers Mfg. v. NLRB*, 486 F.2d 644 (6th Cir. 1973), *cert. denied*, 416 U.S. 937 (1974). Both cases are inapplicable to the stated proposition. In *Frick*, the Third Circuit Court of Appeals held that "it was proper for the Board to rule that the Company is precluded from relying on the number of replacements hired during an *unfair labor practice strike* as evidence rebutting the presumption of continuing majority status." *NLRB v. Frick Co.*, 423 F.2d at 1334 (emphasis added). Similarly, the Sixth Circuit held that "the Company's engagement in *unfair labor practices* during the strike . . . casts a shadow on allegations of good faith." *Rogers Mfg. v. NLRB*, 486 F.2d at 647 (emphasis added). Unlike the *economic strikes* in *Station KKHI* and here, the strikers in an unfair labor practice strike are entitled to reinstatement to their former jobs, and their replacements are, as a matter of law, only temporary.

previously have accepted the union as their exclusive bargaining representative by working under the union's bargaining agency during conditions of industrial peace. Thus, even though crossovers may abandon a strike, the Board maintains that such action does not support a presumption that the crossovers repudiate the union as their *chosen* bargaining representative. *See, e.g., Celanese,* 95 N.L.R.B. at 674; *NLRB v. Pennco,* 684 F.2d 340, 342 (6th Cir.), *cert. denied,* 459 U.S. 994 (1982).

As opposed to crossovers, permanent replacements never have indicated any acceptance of the incumbent union as their bargaining representative. From the outset, replacement workers take jobs of the strikers and assume positions diametrically opposed to the union, the strikers, and their collective bargaining goals.

The Board's only justification that permanent replacements may support the incumbent union is its reference to the hypothetical replacement who "may be forced to work for financial reasons . . . but still desire[s] union representation. . . ." *Station KKHI,* Pet. App. at 75a. What the Board fails to recognize, however, is that the very reason the replacement worker crosses the picket line (i.e., to obtain employment) is the same reason that he or she will not support the union whose primary goal is to secure his or her discharge. Assuming, *arguendo,* that when an employer withdraws recognition some of the replacement workers may desire collective bargaining, it is simply inconceivable that they would choose *the incumbent* union as their representative.[16]

16. Footnote 17 of Brief for Petitioner sets forth a list of issues that a union may pursue after the strike has been terminated. The Board's concern that the strikers will not be represented, ignores the fact that the Act protects the interests of the strikers, and the union can police compliance with the Act by filing unfair labor practice charges as occurred in the cases cited by the Board in n.17. But the more important point is that the interests of the replacements *continue* to be *diametrically opposed* to those of the strikers, to whom the union owes its primary allegiance, even after the strike is ended. *See, e.g., TWA,* 109 S. Ct. 1225 (1989). Because the replacements *categorically* hold inferior seniority to the strikers, disputes concerning the strikers' rights to promotional opportunities, job and shift preference will continue to be a source of division between the groups. Indeed, post-strike arbitration cases concerning *contractual* claims of strikers to jobs, promotions, shifts and other benefits achieved by replacements during the strike are commonplace. *See, e.g., Wilson & Co.,* 34 Lab. Arb. (BNA) 125 (1960) (Perry, Weinstein, Arb.); *Dynamic Mfrs.,* 36 Lab. Arb. (BNA) 635 (1960) (Crane, Arb.); *Florida East Coast Ry.,* 41 Lab. Arb. (BNA) 1001 (1963) (Platt, Bok, Guthrie, Arb.); *Tarcon, Inc.,* 64 Lab. Arb. (BNA) 955 (1975) (Williams, Arb.); *Kimberly-Clark Corp.,* 83 Lab. Arb. (BNA) 1094 (1984) (Weiss, Arb.).

Consequently, despite its contention that its empirical judgments are entitled to deference, the Board has failed to provide any evidence, empirical or otherwise, to support its adoption of the "no-presumption" rule. This rule is, in effect, "no more than a fiction of rationalization, unsupported in Board law, or any law." *Stoner Rubber Co.,* 123 N.L.R.B. at 1450.[17] The Board must do more than merely cite "past decisions" inconsistent with the proposition it is propounding and must do more than state that it has "as-

17. Although the Board contends that there is no "empirical evidence" to support the presumption that permanent replacements do not support the incumbent union, a recent article, Montgomery, *The Influence of Attitudes and Normative Pressures on Voting Decisions in a Union Certification Election,* 42 Indus. & Lab. Rel. Rev. 262 (1989), states that there is a correlation between experience with unions and the way a person votes in a Board election. *Id.* at 277. This empirical finding supports an inference that the replacements hired by CMS would not view favorably representation by the Union, because (i) Howard Reed called the strike against the wishes of the bargaining unit employees based on his personal vendetta and (ii) as a consequence of this unwarranted and unwanted strike, all of the strikers lost their jobs. In a damaging admission, the Board appears to recognize this principle: "the post-strike union cannot be certain whether it will command sufficient support to continue as the exclusive representative." Brief for Petitioner at 22.

sessed [its] experience" without referencing a single incident in its fifty-year history in which the permanent replacements desired representation from the incumbent union. Pet. App. at 74a. The Board is obligated to articulate the evidence upon which it relies before imposing a bargaining agent on a majority of employees who never have accepted the union as their representative and whose interests are in direct conflict therewith. *See NLRB v. A.P.W. Prods.*, 316 F.2d 899, 906 n.2 (2d Cir. 1963).

B. The Board's Treatment Of Permanent Replacements Is Inconsistent With Decisions Of This Court.

In 1939, this Court decided *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939), in which the employer lawfully discharged certain "sit-down" strikers. Thereafter, new employees were hired to replace them. *Id.* at 249. Reversing the Board's finding that the employer was obligated to continue to bargain with the union, this Court stated:

> In view of the change in the situation by reason of the valid discharge of the "sit-down" strikers and the filling of the positions with new men, we see no basis for a conclusion that after the resumption of work Lodge 66 was the choice of a majority of respondent's employees for the purpose of collective bargaining.

Id. at 261-262; *see also NLRB v. Ohio Calcium Co.*, 133 F.2d 721, 728 (6th Cir. 1943); *Fort Smith Chair Co.*, 143 N.L.R.B. 514, 520 (1963); *Beacon Upholstery Co.*, 226 N.L.R.B. 1360 at 1368 (after lawful discharge of strikers, the unit consisted of 10 replacements and 3 nonstrikers; therefore, the employer "had a reasonably

based doubt that the Union continued to represent a majority of the employees in the bargaining unit"). These holdings recognize that replacements for discharged strikers do not support the incumbent union, and therefore should not be counted toward the union's majority.

Similarly, in *NLRB v. Burns Int'l Sec. Servs.*, 406 U.S. 272 (1972), this Court held that, in successorship situations, when the successor's work force consists in majority part of former employees of the predecessor, the successor is obligated to bargain with the union that represented the predecessor's employees. *Id.* at 278-279. The Court said "*it would be different* if Burns had not hired employees already represented by a union certified as a bargaining agent, and the Board recognized as much at oral argument." *Id.* at 280-81 (emphasis added) (footnote omitted).[18]

Fifteen years later, in *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 41 (1987), this Court reaffirmed *Burns*. The dissent stated:

> This means that unless a majority of the new company's workers had been employed by the former company, there is no justification for assuming that the new employees wished to be represented by the former union, or by any union at all. *Spruce Up Corp.*, 209 N.L.R.B. 194. *Indeed, the rule hardly*

18. In response to the Court's question whether a majority of the successor's employees must have been represented by the bargaining agent, the Board stated "I wouldn't say that it has to be a majority, I think it has to be a substantial number. It has to be enough to give you a continuity of employment conditions in the bargaining unit." *Burns*, 406 U.S. at 281, n.6 (citation omitted). Thus, it would appear that the Board's willingness to sacrifice the will of the majority in the name of stability in bargaining relationships was manifested in its initial approach to the successorship question, just as it is in cases in which an employer hires a new work force to replace economic strikers.

> *could be otherwise. It would be contrary to the basic principles of the NLRA simply to presume in these cases that a majority of workers supports a union when more than half of them have never been members, and when there has been no election.*

Id. at 59-60 (Powell, J., dissenting) (citations omitted) (emphasis added).[19]

When viewed from the standpoint of the group of new employees, who either replace the predecessor's employees (the successorship case) or replace the economic strikers, the question is whether there is a valid basis for assuming that the different groups are likely to view differently representation by the incumbent union. Neither group has previously been affiliated with or endorsed representation by the union, and in the case of the replacements, they have entered the employment relationship under terms of extreme hostility toward the incumbent union. Therefore, there is a *greater reason* for inferring that permanent replacements are likely to oppose representation by the incumbent union and ought not to be counted toward its majority.

C. The Board's No-Presumption Rule Is Inconsistent With The Legislative History Of Section 9(c)(3) Of The NLRA.

The Taft-Hartley Act of 1947, by the addition of § 9(c)(3), denied permanently replaced economic strikers the right to vote in a union representation election. 29 U.S.C. § 159(c)(3) (1947). Twelve years later,

19. *Spruce Up Corp.*, 209 N.L.R.B. 194, *enforced*, 529 F.2d 516 (4th Cir. 1974), cited in the *Fall River* quote above, involved both successorship and permanent replacements. The clear implication of the *Spruce Up* holding is that permanent replacements should not be counted toward the union's majority. *Id.* at 195-196.

Congress amended § 9(c)(3) when it passed the Labor-Management Reporting and Disclosure Act ("LMRDA"). Under the amended Act, permanently replaced strikers were once again eligible to vote in a representation election, but only for a period of one year.

Although § 9(c)(3), as amended, primarily addresses the eligibility of strikers and their replacements to vote in a representation election, the Board has recognized that this "provision [is] pertinent . . . in determining whether an employer has a reasonable basis for questioning an incumbent union's presumed majority status, since the ultimate basis for the employer's asserted doubt here is that a majority of the employees in the *unit* are not union adherents." *C. H. Guenther & Son,* 174 N.L.R.B. 1202, 1203 (1969), *enforced,* 474 F.2d 983 (5th Cir. 1970). While policy considerations differed under Taft-Hartley and the LMRDA, Congress, nevertheless, explicitly contemplated that permanent replacements would not support the incumbent union.

In 1947, legislation introduced in the Senate (S. 1126) and the House (H.R. 3020) would have denied the right to vote in representation elections to strikers who had been permanently replaced. The opposition to both bills recognized that allowing permanent replacements to vote in a representation election to the exclusion of strikers would result in the ouster of the union. The Senate Minority Report on S. 1126 observed that "the strikers who normally would constitute the bulk of the union's adherents could not vote, [and] the *defeat of the bargaining agent is thus assured.*" S. Rep. No. 105, Pt. 2, 80th Cong., 1st Sess. 10 (1947) (emphasis added).[20] Similarly, the

20. The late Representative Claude Pepper, while serving in the Senate, was most vehement in his opposition to this aspect of S. 1126, concluding that "the old union would be broken, the collect[ive]

House Minority Report objected to H.R. 3020 as being anti-union:

> Thus, even if a labor organization goes on strike because of disagreement as to the terms or conditions of employment, the strikers cease to be employees if, while they are engaged in such strike they are replaced. . . . Since they would thereafter no longer be 'employees', their strike becomes illegal. *For the union that called them out would no longer represent a majority of the 'employees';* as it could no longer claim bargaining rights, its members would be striking for an illegal purpose from that moment forward.

H. Rep. No. 245, 80th Cong., 1st Sess. 95 (1947) (emphasis added).

In order to repeal what was seen as the undesirable consequence of the Taft-Hartley Act, Senator Kennedy of Massachusetts introduced S. 1555 on March 25, 1959. Senator Kennedy recognized:

> The difficulty which this amendment is designed to rectify occurs when employees go on strike, and the company undertakes to employ replacements, and is able to resume normal production, by using a number of new employees, as well as certain of the returning strikers. Under such circumstances the union is virtually deprived of any bargaining power; *and if a representation election is held the*

bargaining agent would be repudiated, *because the new workers would repudiate the old bargaining agent with which it had never had any connection, ...*" 93 Cong. Rec. S4321 (daily ed. Apr. 29, 1947), *reprinted in 2 NLRB, Leg. Hist. of the LMRA* at 1103 (emphasis added); *see also* 93 Cong. Rec. S1893 (daily ed. March 10, 1947) (statement of Sen. Morse), *reprinted in 2 NLRB, Leg. Hist. of the LMRA* at 956 ("[t]he strikebreakers are now the only employees of the employer . . . . *The union no longer represents a majority of the employees*").

> *union loses, because it is not likely that the replacement workers will vote for the union.*

105 Cong. Rec. S5746 (daily ed. Apr. 21, 1959) (emphasis added). Similarly, Senator Goldwater noted that S1555: "would effectively inhibit the employer from precipitating a strike for the purpose of replacing the strikers, calling for an NLRB election in which the *replacements vote against the union, and thus getting rid of the union.*" 105 Cong. Rec. S9118 (daily ed. June 8, 1959) (emphasis added).

The Conference Committee ultimately produced the present-day version of § 9(c)(3). While granting both the replaced economic strikers and their replacements the opportunity to vote on representation, the former group's right is limited to a period of one year after commencement of the strike. Representative Roosevelt voiced organized labor's concern that this compromise bill was still insufficient: "it would be to the advantage of a struck employer not to seek an election, following the hiring of strikebreakers, but rather to wait out the year, *form a company union with the strikebreakers, and then demand an election which would result in decertification of the union whose members are on strike.*" 105 Cong. Rec. H.16,644 (daily ed. Sept. 4, 1959) (emphasis added).[21]

21. Organized labor's feelings about § 9(c)(3) have not changed. As Bernard Jolles, Counsel, Western Counsel of Lumber, Production & Industrial Workers, United Brotherhood of Carpenters & Joiners of America, AFL-CIO recently stated: "In many instances, even if no decertification petition has been filed, the employer himself can file a petition for an election, claiming that he has a good faith doubt as to the continued majority status of the union. This precipitates an election, and again the *strikebreakers vote out the union.*" *Oversight Hearings on the Subject "Has Labor Law Failed" Before the Subcomm. on Labor-Management Relations of the Comm. on Education and Labor,* 98th Cong., 2d Sess. 134-135 (1984) (emphasis added).

Thus, the Board has failed to reconcile its no-presumption approach with Congress' explicit recognition that replacement workers would reject representation by the incumbent union.

II.

The Board's Decision Is Arbitrary And Capricious Because The Board No Longer Adheres To Its Own Articulated Standard For Evaluating The Propriety Of An Employer's Withdrawal Of Recognition

In 1951, the Board developed the now well-established principles for determining the lawfulness of an employer's withdrawal of union recognition following the certification year.[22] The Board's decision in *Celanese*, 95 N.L.R.B. at 664, established that an employer may rebut the presumption of continuing majority and lawfully withdraw recognition from an incumbent union if it can demonstrate *either* (1) that the union has, in fact, lost

22. Despite the challenges by the AFL-CIO as *amicus curiae* in support of Petitioner, these governing principles are well settled. The good faith doubt defense has long been applied by the Board, *Atlanta Journal Co.*, 82 N.L.R.B. 832 (1949), *enforced*, 187 F.2d 13 (5th Cir. 1951); *Celanese*, 95 N.L.R.B. at 664, and adopted without exception by the courts of appeal. *See, e.g., Briggs Plumbingware, Inc. v. NLRB*, 877 F.2d 1282, 1288 (6th Cir. 1989); *Bickerstaff Clay Prods. Co. v. NLRB*, 871 F.2d 980, 984 (11th Cir. 1989); *Hajoca Corp. v. NLRB*, 872 F.2d 1169, 1173 (3d Cir. 1989); *United Supermarkets, Inc. v. NLRB*, 862 F.2d 549, 552 (5th Cir. 1989); *Bryan Memorial Hosp. v. NLRB*, 814 F.2d 1259, 1262 (8th Cir. 1987). Although this Court never has explicitly addressed the validity of the good faith doubt test, the Court has cited the *Celanese* case with approval. *See Brooks v. NLRB*, 348 U.S. 96, 101 (1954); *Burns*, 406 U.S. at 272 n.3 (1972); *Fall River*, 482 U.S. at 41, n.8. The Board has recognized as much. *Stoner Rubber Co.*, 123 N.L.R.B. 1440, 1444 n.9 (1959); *Station KKHI*, Pet. App. at 61a. The Board has not repudiated this rule and neither have the courts. This Court, therefore, need not direct the abandonment of these long-standing principles that have governed labor-management relations for the past four decades.

its majority support (the "minority-in-fact test"), or (2) that the employer has a good faith doubt, based on objective considerations, concerning the union's continuing majority (the "good faith doubt test"). The Board itself has recently reiterated that these two tests are different: "[t]he first method deals with *establishing a fact*, whereas the second method pertains to *'a sufficient objective basis for a reasonable doubt.'* " *J & J Drainage Prods. Co.*, 269 N.L.R.B. 1163, 1171 (1984) (emphasis added). Thus, to justify withdrawal of recognition, an employer need not conclusively demonstrate that a majority of its employees no longer desire to be represented by the union. *Bickerstaff Clay Prods. Co. v. NLRB*, 871 F.2d 980, 985 (11th Cir. 1989); *Randle-Eastern*, 584 F.2d at 729; *NLRB v. Anvil Prods.*, 496 F.2d 94, 96 (5th Cir. 1974). Indeed, in *Bartenders, Hotel, Motel & Restaurant Employers Bargaining Ass'n*, 213 N.L.R.B. 651, 654 n.21 (1974), the Board reiterated its allegiance to the good faith doubt test and restated its long-accepted principle that an employer may withdraw recognition *"if the employer can prove reasonably grounded doubt of that status based on objective considerations free of unfair labor practices."* (emphasis added). *See also Automated Business Sys.*, 205 N.L.R.B. 532, 535 (1973).

Despite its professed adherence to the good faith doubt standard, in recent years the Board has been loath to find that an employer's withdrawal of union recognition was based on an asserted good faith doubt of union majority support. In this case, for example, the Board trivialized the Company's evidence, evaluated each asserted factor in isolation, and gave no probative effect to the hiring of permanent replacements. In essence, the Board has hidden the fact that it has changed the rules applicable

to withdrawal of recognition. Such an unarticulated departure from its stated policy must not be countenanced.

A. It Is A Well-Accepted Principle That An Employer Need Not Prove Minority-In-Fact To Justify Withdrawal Of Union Recognition, But May Rely On A Reasonably Based Good Faith Doubt That The Union Enjoys Majority Support.

A careful reading of the Board's decision in *Celanese* discloses the critical principle upon which the good faith doubt standard is based: the quantum of proof necessary to rebut the presumption of continuing majority varies depending on the test relied upon by the employer (i.e., minority-in-fact test or good faith doubt test). A comparison of the majority opinion and the dissent in *Celanese* vividly illustrates this point. The dissent advanced the argument that the presumption could not be rebutted on a mere showing of good faith doubt, but insisted that the presumption of continuing majority could be rebutted *only* if the employer offered *competent evidence* that the bargaining representative was, in fact, no longer the majority choice of the employees in the bargaining unit. *Celanese,* 95 N.L.R.B. at 676.

The dissent based its argument upon several grounds. First, it reasoned that it was incorrect from an evidentiary standpoint to permit a presumption to be defeated by evidence supporting a good faith doubt. Rather, the dissent would have required evidence "that the Union *in fact* did not represent the majority of the employees" before the presumption could be rebutted. *Id.* at 675 (emphasis in original). The dissent quarreled with the majority's "legal reasoning" and concluded that "[c]ertainly it does not follow from the fact that one has the right to *rebut*

a presumption by showing that a different status obtains, that it is sufficient to overcome the presumed status to show that one has good faith doubts as to the truth of the presumption." *Id.* at 675. Second, the dissent argued that it was for the Board, and not the employer, to determine whether the circumstances relied upon have rebutted the presumption. Thus, it reasoned that the good faith of the employer in challenging the union's majority was reasoned to be "immaterial." *Id.* at 676. Finally, the dissent concluded that the good faith doubt test adopted by the majority "will encourage annual challenges to majority status and tend to disrupt bargaining stability." *Id.* at 677.

In stark contrast, the majority concluded that "the employer can, without violating the Act, refuse to bargain with a union on the ground that it doubts the union's majority, *provided* that the doubt is in *good faith.*" *Id.* at 672 (footnote omitted) (emphasis in original). The majority recognized that evidence insufficient to rebut the presumption in a technical sense may nonetheless justify withdrawal of recognition:

> [U]nless we are to hold, with our dissenting colleagues, that a good faith doubt of majority cannot be urged as a defense even after the certificate year we do not reach the issue of the *fact* of majority, and are thus *not concerned with whether the presumption created by the certificate was rebutted by competent evidence,* until we first ascertained whether the doubt of majority was raised in good faith.

Id. at 672 n.16 (emphasis added). *See also Automated Business Sys.,* 205 N.L.R.B. at 535; *Retired Persons Pharmacy,* 210 N.L.R.B. 443, 445-446 (1974), *enforced,* 519 F.2d 486 (2d Cir. 1975) (stating that

"competent evidence" is not required). After holding that the employer was free to decline to bargain with the union if its doubt as to the union's majority was raised in good faith, the Board clarified the meaning of the test: the doubt must be based on "reasonable grounds for believing that the union had lost its majority status" (the "reasonableness" factor) and the question of majority support must not have been raised in the context of illegal anti-union activities (the "good faith" factor). *Id.* at 673.

B. Despite The Acceptance Of The Good Faith Doubt Defense, The Board's Practice Indicates That It Impermissibly Has Departed From Its Own Policy.

In *Station KKHI* the Board resurrected the evidentiary and policy arguments relied upon by the dissent in *Celanese* and, *sub silentio,* reversed *Celanese.* The Board in *Station KKHI* reasoned that the "presumption of continuing majority" requires an employer to come forward with "objective evidence that the representative the employees have designated *no longer enjoys majority support.*" *Station KKHI,* Pet. App. at 62a (emphasis added). Indeed, in *CMS,* the Board held "we conclude that the evidence is insufficient *to rebut the presumption of the Union's continuing majority,*" rather than making a finding as to CMS's good faith doubt. *Id.* Pet. App. at 35a (emphasis added). The Board thus ignored the teaching of *Celanese* that "competent evidence," such as that sufficient to rebut the presumption of continuing majority support is *not* necessary to establish good faith doubt. *Celanese,* 95 N.L.R.B. at 674. As such, the Board accords no weight to an employer's evidence that replacements were hired, unless the evidence is sufficient to create a *presumption* that permanent replacements are *not* union adherents. The related requirement that an em-

ployer's proof must be competent to rebut the presumption of continuing majority has the same effect. Both of these requirements demand proof that the replacements, *in fact, are opposed to the union.*

The Board's Brief confirms that *Station KKHI* has departed from the good faith doubt standard: *"[o]nly by demonstrating that the replacements are actually opposed to the union may an employer carry his burden of proving a good-faith doubt of majority status."* Brief for Petitioner at 20 (emphasis added). Indeed, the Board's abhorrence of the good faith doubt standard pervades its Brief. For example, the Board's stated reason for rejecting the Gorman presumption is that "by relieving the employer of the burden of coming forth with evidence that the striker replacements *actually oppose the union,* the Gorman presumption would make it easier for an employer to justify a withdrawal of recognition." Brief for Petitioner at 21 (emphasis added). Thus, the Board's current application of the good faith doubt standard is in conflict with the holding in *Celanese* that proof by competent evidence of minority-in-fact is not required to justify withdrawal of recognition.

Following the *Station KKHI* decision, the *only* proof that the Board has accepted as satisfying the good faith doubt standard is actual proof of minority-in-fact, thus indicating that the Board has merged its dual standard for evaluating employer withdrawal of recognition. It appears that the only cases finding that an employer sustained its burden of establishing good faith doubt since *Station KKHI* are: *Bil-Mar Foods, Inc.,* 286 N.L.R.B. No. 84 (Nov. 4, 1987) (authenticated petition signatures indicating that a majority of employees rejected the union); *Airport Aviation Serv.,*

Inc., 292 N.L.R.B. No. 87 (Jan. 31, 1989) (petition indicating majority of employees rejected the union and second petition to de-authorize dues check-off); *Atwood & Morrill Co.*, 289 N.L.R.B. No. 100 (July 12, 1988) (clear and unambiguous evidence that the union had lost majority support); *Paper Bd. Cores, Inc.*, 292 N.L.R.B. No. 107 (Feb. 10, 1989) (decertification petition signed by exactly fifty percent of employees).

Even under the most compelling facts, the Board has rejected good faith doubt claims.[23] In *Bickerstaff Clay Prods. Co.*, 286 N.L.R.B. No. 27 (Sept. 30, 1987), *enforcement denied*, 871 F.2d 980 (11th Cir. 1988), for example, the Board rejected the company's asserted good faith doubt even though the employer hired significant numbers of permanent replacements, there was violence associated with the strike, there was significant breakdown in union leadership, a reduction in union activity, and a clear record of employee dissatisfaction with the union's representation. Finding that this decision

23. Since the Board's *Station KTHI* decision, the Board has not once found the good faith doubt standard satisfied in cases involving striker replacements. *Accurate Die Casting Co.*, 292 N.L.R.B. No. 106 (Feb. 10, 1989); *Bickerstaff*, 286 N.L.R.B. No. 27 (Sept. 30, 1987), *enforcement denied*, 871 F.2d 980 (11th Cir. 1989); *Christopher St. Owners Corp.*, 286 N.L.R.B. No. 22 (Sept. 30, 1987); *Cook Bros.*, 288 N.L.R.B. No. 46 (April 8, 1988); *Curtin Matheson Scientific, Inc.*, 287 N.L.R.B. No. 35 (Dec. 16, 1987), *enforcement denied*, 859 F.2d 362 (5th Cir. 1988), *cert. granted*, 109 S. Ct. 3212 (1989); *Dold Foods, Inc.*, 289 N.L.R.B. No. 156 (July 28, 1988); *Glover Bottled Gas Corp.*, 292 N.L.R.B. No. 99 (Feb. 8, 1989); *Hajoca Corp.*, 291 N.L.R.B. No. 16 (Sept. 30, 1988), *enforced*, 872 F.2d 1169 (3d Cir. 1989); *Johns-Manville Sales Corp.*, 289 N.L.R.B. No. 40 (June 27, 1988); *Proxy Communications*, 290 N.L.R.B. No. 68 (July 29, 1988), *enforced*, 873 F.2d 552 (2d Cir. 1989); *Tube Craft, Inc.*, 289 N.L.R.B. No. 122 (July 14, 1988); *Valley Kitchens, Inc.*, 287 N.L.R.B. No. 69 (Dec. 16, 1987); *Wallkill Valley Gen. Hosp.*, 288 N.L.R.B. No. 18 (March 23, 1988), *enforced*, 866 F.2d 632 (8th Cir. 1989).

strayed from the Board's own long-standing pronouncements, the Eleventh Circuit reversed the decision and refused enforcement of the Board's order. *Bickerstaff*, 871 F.2d at 985. The court concluded, contrary to the Board, that the cumulative effect of all the evidence presented by the company was sufficient to satisfy the employer's burden of showing a good faith doubt. *Id.* at 994. The Board was criticized for evaluating the factors supporting the good faith doubt claim in isolation and was admonished for rejecting "a composite showing of objective evidence which [was] sufficient to establish, clearly and convincingly, that Bickerstaff had a reasonable basis to support a good faith doubt. . . ." *Id.*[24]

The Board was also specifically criticized for its unrealistic treatment of picket line violence and the resulting impact on an employer's good faith doubt. The Board discounted evidence of extreme picket line violence because the employer was able to "suppress" recurring violence based on a state court injunction. The court disagreed, concluding that there is no requirement that the replacements must have crossed the picket line directly in the face of violence before such evidence may be *probative* of a good faith doubt. *Id.* at 989. "Once a pervasive atmosphere of violence is established in a strike situation, that atmosphere does not vanish as soon as the violence ceases." *Id.* The court thus concluded that the circumstances of picket

24. Other cases have criticized the Board's analysis of facts in isolation rather than considering cumulative effect of all of the evidence. *Thomas Indus. v. NLRB*, 687 F.2d 863, 868 (6th Cir. 1982); *Bellwood General Hosp. v. NLRB*, 627 F.2d 98, 104 (7th Cir. 1980); *Dalewood Rehabilitation Hospital v. NLRB*, 566 F.2d 77, 80 (9th Cir. 1977); *Star Mfg. v. NLRB*, 536 F.2d 1192, 1196 (7th Cir. 1976); *Royal Typewriter Co. v. NLRB*, 533 F.2d 1030, 1036 (8th Cir. 1976).

line violence were indicative of the employer's good faith doubt of continuing majority support.

As the Ninth Circuit recognized in *Mingtree Restaurant, Inc., v. NLRB,* 736 F.2d 1295, 1297 (9th Cir. 1984), the Board now requires evidence sufficient "unequivocally to indicate" that union support has declined to a minority. In that case the court concluded that "[g]iven this strict interpretation of good faith doubt, there is little difference between the evidence necessary to prove a union's minority-in-fact and the employer's reasonable good faith doubt." *Id.; see also Destileria Serrales, Inc. v. NLRB,* 882 F.2d 19, 21 (1st Cir. 1989).[25] This deviation from prior precedents, without accompanying principled explanation for the deviation, makes the Board's decision in this matter arbitrary as a matter of law. *Atchison, T. & S.F. Ry. v. Wichita Bd. of Trade,* 412 U.S. 800, 808 (1973) (an administrative agency has a "duty to explain its departure from prior norms"); *Secretary of Agric. v. United States,* 347 U.S. 645, 653-54 (1954); *NLRB v. Metal Container Corp.,* 660 F.2d 1309, 1314 (8th Cir. 1981); 2 K. Davis, *Administrative Law Treatise* § 8:9 at 198 (1979). The Board's adoption

25. Still other courts believe that an employer must demonstrate its good faith doubt by "clear, cogent and convincing evidence." *NLRB v. Tragniew, Inc.,* 470 F.2d 669, 674-675 (9th Cir. 1972); *see Hajoca Corp. v. NLRB,* 872 F.2d at 1174; *St. Agnes Medical Center v. NLRB,* 871 F.2d 137, 145 (D.C. Cir. 1989); *Louisiana-Pacific Corp. v. NLRB,* 858 F.2d 576, 578 (9th Cir. 1988); *Landmark Int'l Trucks, Inc. v. NLRB,* 699 F.2d 815, 819 (6th Cir. 1983); *Orion Corp. v. NLRB,* 515 F.2d 81, 85 (7th Cir. 1975). Despite these observations, the Board continues to adhere to its policy that the quantum of proof necessary under the good faith doubt standard is less than actual proof of loss of majority in fact. In *Bolton-Emerson, Inc.,* 293 N.L.R.B. No. 139 (May 18, 1989) slip op. at 2 n.2, the Board recently rejected any notion that an employer's good faith doubt must be demonstrated by clear, cogent, and convincing evidence.

of the good faith doubt standard as a means for rebutting the presumption of continuing majority support is a proper exercise of administrative discretion, and the Board is bound to adhere to that policy until it is modified or explicitly abandoned. *NLRB v. Campbell Prods. Dep't,* 623 F.2d 876, 881 (3d Cir. 1980). Moreover, counsel for the Board may not now attempt to formulate what the Board's position would have been on these issues had they been addressed by the Board in *Station KKHI* or *CMS.* Guesswork by agency counsel is not an acceptable substitute for agency rationales. *Bowen v. Georgetown Univ. Hosp.,* 109 S. Ct. 468, 473 (1988) ("[w]e have declined to give deference to an agency counsel's interpretation of a statute where the agency itself has articulated no position on the question"); *SEC v. Chenery Corp.,* 322 U.S. 194, 196 (1947).

Contrary to the Board's practice, the question is not whether a presumption concerning striker replacements is itself sufficient to rebut the overall presumption of continued majority support, but whether the hiring of striker replacements is sufficient to create a reasonably-based *doubt* concerning continued majority support. Properly applied and evaluated, CMS has satisfied the good faith doubt standard in this case.

C. Under Proper Application Of The Test, CMS Demonstrated A Reasonable Good Faith Doubt.

Plainly obvious to the employees and management alike was the fact that the strike was not called to further the interests of CMS's employees. Rather, the strike was called to satisfy, a "personal vendetta" of Business

Representative Howard Reed.[26] J.A. 145 [Tr. 147, Tr. 147]. Consequently, as the ALJ found, the strike was, from the start, unpopular with and unwanted by the unit employees. J.A. 31; *compare* Pet. App. 28a *with* Pet. App. 52a.

The employees expressed their disapproval of the strike and the Union from the beginning. For example, five of the original twenty-seven member work force crossed the picket line on the first day of the strike and thereafter reported to work. J.A. 47, 50, 135. Moreover, Shady Goodson, the Union's Chief Shop Steward and member of the Union negotiating committee, complained to management about the difficulty he encountered in manning the picket line and developing a picket roster. J.A. 29-30, 36-37, 145 [Tr. 142, Tr. 147]. And the number of strikers who served on the picket line dwindled quickly.[27]

The employees' apathy for the strike was exceeded only by the Union's indifference to the strikers. In this regard, other than one piece of correspondence, which was unrelated to the strike or negotiations, the Union made no attempt during the strike to communicate with CMS to resolve what had been from the start, a conspicuously unpopular strike. J.A. 136 [Tr. 7, Tr. 7].

26. The ALJ specifically found that the Chief Shop Steward, Shady Goodson, reported to CMS that "the strike was based on the hostility of the Union's Business Agent, Howard Reed. . . ." Pet. App. 52a & n.7. Reed's betrayal of the employees resulted in crossover employee, Tony Lopez, describing Reed to CMS management as a "rotton S.O.B. that is screwing the employees, taking their money, and doing nothing for us." J.A. 25.

27. This observation was made by CMS Director of Employee Relations, Elizabeth Price, whose testimony and notes the ALJ generally credited. Pet. App. 31a, 49a, 52a n.7. Moreover, strikers admitted to Price that they refused to man the picket line because of dissatisfaction with the Union. Among the strikers who declined to participate in the picketing activities was J. R. Blackshire who had been a Union Steward a year prior to the strike. J.A. 144 [Tr. 142, Tr. 147].

Blackshire and Doucette also criticized the Union's failure to provide support to the strikers. Even the Shop Steward Goodson confessed that the strike efforts were affected adversely because he was having *difficulty getting help from the Union* for the very strike the Union had instigated against the wishes of the unit employees.

And faced with a Union that had called an unnecessary and unwanted strike, and a Union that had failed to support its own members during a critical period, CMS witnessed the inevitable result: the Union's loss of support among unit employees. For example, the Union's leaders (Goodson and Blackshire) volunteered to CMS that they were completely disillusioned with the Union and that the other strikers would not support the Union and did not want the Union to represent them anymore; consequently, the Union had "lost all of their support from the employees in the unit." Moreover, Pete Doucette, Departmental Steward and a member of the Union's negotiating committee, abandoned the strike and requested reinstatement to his former job, and Goodson, eventually resigned. J.A. 15, 147 [Tr. 142, Tr. 145], 154 [Tr. 163, Tr. 163].

Crossover employees, Tony Lopez and Bill Lee, initiated conversations with Price for purposes of voicing their animosity toward the Union. Striker Raymond Brunner tendered his written request for early retirement, stating as the reason his desire to disassociate himself from the Union; J.A. 148 [Tr. 142, Tr. 147], 149 [Tr. 142, Tr. 147]; and striker Robbie Madison flatly resigned. J.A. 155 [Tr. 163, Tr. 163]. Striker Clint Waller confirmed his prior conversations with management by sending letters to CMS and the Union stating "I wish not to be a member of the Teamsters no longer at Curtin Matheson Scientific,

Inc., *or anywhere else*." J.A. 150, 151 [Tr. 150, Tr. 150] (emphasis added).

As for the replacements, they harbored no misconceptions as to the Union's loyalties. To report to work each day, these replacements crossed a hostile picket line, which, of course, did not endear them to the strikers or to the Union. Moreover, they knew that their continued employment was threatened by the Union and its striking members. Replacement Tim Hartman expressed to Price his concern over a rumor circulating among the replacements that they all would be laid off to make room for the strikers. J.A. 165 [99, 100]. And replacement David Schneider informed Price that the Union was not needed at CMS. J.A. 169 [99, 100]. The Union never attempted to contact the replacements, thus confirming the Union's disdain for them. Pet. App. 30a. Neither was there any evidence that the replacements attempted to contact the Union.

The Board responded to the evidence supporting CMS's doubt by counting the heads of those employees who individually came forward to articulate their unequivocal repudiation of the Union (Pet. App. 34a-35a), and trivialized the facts and circumstances that lay before CMS when it formulated its good faith doubt.

In this way, the Board abused its discretion by failing to attribute more credit to the overall anti-union statements made by the employees to their union leaders and the observations made by the union leaders of the declining Union support among the employees.[28] Moreover,

28. Although Blackshire was no longer a steward at the time of the strike, he was "a leader" among the employees. J.A. 48; *see, e.g., Randle-Eastern*, 584 F.2d at 720 ("employer must rely on a Union officer's admission that the Union has lost majority support as objective evidence to support a good faith doubt"); *Lodges 1746 & 743, Int'l*

the Board ignored the *cumulative effect* of statements made by *all of the Union leaders* who, by June 29th either repudiated the Union, abandoned the strike, or both.[29] And the Board completely omitted from its opinion the fact that on June 29th Departmental Steward Pete Doucette abandoned the strike.

To further trivialize the facts as perceived by CMS, the Board gave no weight to the fact that Howard Reed called the strike because of his personal vendetta, or to the five crossover employees who refused to join the strike. Pet. App. 32a-33a. The Board generalized that crossovers may reject the strike purely for economic reasons. *Id.* Combined, however, with the crossovers' refusal to join the strike is the fact that none of the five were members of the Union. J.A. 47. Again, the Board refused to recognize the *cumulative effect* of relevant facts.

Still relying upon generalizations to reach its predetermined result, the Board notes that the Union's indifference to the replacements is "common to the hiring of replacements." Pet. App. 33a. Whether common or not, this factor, when combined with (1) the replacement of all strikers; (2) the Union's July 16th offer to return all of the

Ass'n of Machinists & Aerospace Workers v. NLRB, 416 F.2d 809, 813 (D.C. Cir. 1969), *cert. denied*, 396 U.S. 1058 (1970) (admission by one in a position to know the sentiments of employees, may alone be an important factor constituting a reasonable basis for doubting the majority support of the union); *J & J Drainage Prods. Co.*, 269 N.L.R.B. 1163, 1171 (1984) (statement by union steward in relatively small unit, that employees were not interested in union should be accorded greater weight than comments by other employees); *see also Bickerstaff*, 871 F.2d at 987.

29. The Board's response to Blackshire's statement, that the "people" were not supporting the Union, was to categorize it as vague; this response serves only to show how unfairly the Board read the CMS record. The record is replete with references to unit employees as the "people," including testimony by Howard Reed. J.A. 30, 32, 67, 68, 71, 81, 83, 84.

striking employees to their prior positions; (3) the rumors circulating among the replacements of their imminent replacement by the strikers; (4) the hostile picket line; and (5) Howard Reed's betrayal of the unit employees by calling an unwanted strike merely to satisfy his personal vendetta—leads to only one logical conclusion: no replacement would have supported *this Union*.

Given the Board's dogmatic reliance on generalizations to undermine CMS's evidence, it is curious, as well as inconsistent, that the Board would find inappropriate any presumption regarding the replacements' Union sentiments. In this regard, the Board seems to say that blind generalizations are appropriate if application of the generalizations serve the Board's goal; generalizations that defeat the Board's goal, however, are deemed inappropriate, even when supported by compelling evidence, decades of Board and court pronouncements, and plain common sense.

The Board's measurement of the evidence using an improper standard and its failure to consider the cumulative effect of all of the evidence, consequently, is arbitrary as a matter of law. Moreover, the cumulative effect of all of the factors before CMS leads to but one reasonable conclusion: CMS had a reasonably grounded good faith doubt concerning the Union's continued majority status. The Board's decision, which would deny CMS even a *reasonable doubt* concerning the Union's support, therefore, is not supported by the record evidence when considered as a whole.[30]

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30. The Fifth Circuit recognized the insufficiency of the evidence supporting the Board's order and accordingly denied enforcement. Having fairly assessed the record evidence, the Fifth Circuit's denial of the Board's order should be respected. *NLRB v. Pittsburgh S. S. Co.*, 340 U.S. 498, 502-503 (1951); *see also South Prairie Constr. Co. v. Local No. 627, Int'l Union of Operating Engineers*, 425 U.S. 800, 803-804 & n.5 (1976).

III.

The Board's Fallacious Policy Arguments Undermine Its Plea For Deference

The Board's primary policy argument for its no-presumption rule is that the adoption of the so-called Gorman presumption would:

> disrupt the balance of competing economic weapons long established in strike situations and substantially impair the employees' right to strike by adding to the risk of replacement the risk of loss of the bargaining representative as soon as replacements equal in number to the strikers are willing to cross the picket line.

Station KKHI, Pet. App. 75a-76a.

Contrary to this assertion, the Board's "long established" practice has been to find that an employer may reasonably doubt that replacements support the union. Moreover, the Board's argument ignores the shifting burden, which allows the union to retain its bargaining agency if, in fact, it continues to enjoy majority support, notwithstanding the employer's good faith doubt.

In *Celanese*, the Board adopted the good faith doubt test, including its concomitant lesser quantum of proof, despite contrary arguments for greater emphasis on the policy of promoting the stability of bargaining relationships. The Board explained in *Stoner Rubber Co.*, 123 N.L.R.B. 1440 (1959), that once the employer establishes its good faith doubt, the burden shifts to the union to prove its majority either (i) by invoking the Board's secret-ballot election process, which was characterized as the "most satisfactory" way to determine a union's majority (*Id.* at 1444) or (ii) by coming forward with evidence that the

union *in fact* represents a majority of the employees, which "it should have no difficulty in presenting." *Id.* at 1445.[31]

The Board's doomsday scenario, which posits the loss of the bargaining representative, is unfounded. *Only if replacements in fact oppose the union will the bargaining representative be lost.* Assuming that the union remains the choice of the majority, at worst there will be a delay as the union obtains an election. The delay need not be great for the following reasons: (1) because there has been a previous certification, the parties should be able to proceed directly to an election without first engaging in a representation hearing;[32] (ii) because of the "good faith"

31. The Board reasoned that proof of majority is peculiarly within the competence of the union. 123 N.L.R.B. at 1445. Subsequent to *Stoner Rubber,* however, the Board disavowed adherence to the second prong of the shifting burden doctrine. In *Automated Business Sys.,* 205 N.L.R.B. 532, 535 (1973), the Board stated that the shifting burden rule was inconsistent with *Celanese* and determined that the good faith doubt defense was absolute. The Sixth Circuit overruled the Board's decision concluding that the shifting burden doctrine was the "better rule." *Automated Business Sys. v. NLRB,* 497 F.2d 262, 272 (6th Cir. 1974). The courts of appeals have uniformly adopted the shifting burden rule. *See, e.g., Bickerstaff,* 871 F.2d at 985; *Creative Food Design, Ltd.,* 852 F.2d 1295, 1300 (D.C. Cir. 1989); *NLRB v. Wilder Constr. Co.,* 804 F.2d 1122, 1124 n.1 (9th Cir. 1986); *Landmark Int'l Trucks,* 699 F.2d at 819; *Bellwood Gen. Hosp.,* 627 F.2d at 104; *W&W Steel Co. v. NLRB,* 599 F.2d 934, 939 (10th Cir. 1979); *Nat'l Car Rental,* 594 F.2d at 1205; *NLRB v. Massachusettes Mach. & Stamping, Inc.,* 578 F.2d 15, 19 (1st Cir. 1978); *NLRB v. Windham Community Memorial Hosp.,* 577 F.2d 805, 811 n.11 (2d Cir. 1978); *NLRB v. Great Atl. & Pac. Tea Co.,* 346 F.2d 936, 940 (5th Cir. 1965). Even if the Board continues to refuse to apply the second prong of the shifting burden analysis, the Board election procedure is still available to the Union.

32. A representation hearing resolves the question whether an employer is engaged in commerce and whether the unit sought by the union is an appropriate unit. 29 C.F.R. § 102.63 and 102.67. This process would not be necessary in this case. CMS's Answer herein admitted the jurisdictional facts, which established that it was engaged in commerce, and CMS stipulated at trial that the unit alleged in the complaint was appropriate. J.A. 8, 115 [Tr. 7, Tr. 7]; 122 [Tr. 7, Tr. 7].

factor in the good faith doubt test, there is no atmosphere of unfair labor practices prior to the assertion of the employer's good faith doubt, which might contaminate the laboratory conditions for an election. In the instant case there is no record of unfair labor practices by CMS against this Union or the unit employees, and CMS invited the Union to file an election petition. Moreover, the Union used this procedure successfully in obtaining the original certificate and promptly obtained a contract. Consequently, there is no basis for fear that CMS would act unlawfully or fail to cooperate in expediting the election.

The Board's policy discussion also ignores the relative ease with which the union can deal with its burden once an employer establishes its good faith doubt, and it ignores the inherent difficulties an employer would face in ascertaining its employees' union sentiments under the *Station KKHI* rule. *See* Brief for Petitioner at 23 where the Board argues that the "employer remains free to marshal evidence concerning the replacements' sentiments. . . ."

The Union's burden is light. For example: (1) the union has leadership in the form of trained business representatives, who know the law and procedures available to establish the existence of its majority; (2) employees who assist the union in its efforts are afforded legal protection by Section 8(a)(1) of the Act. 29 U.S.C. § 158(a)(1) (employer may not "interfere with, restrain or coerce employees in the exercise" of their Section 7 rights); (3) the union need only to produce evidence of thirty percent support within the expanded unit in order to obtain an election, *Linden Lumber Co. v. NLRB,* 419 U.S. 301, 309; (4) there are no rules prohibiting the Union from soliciting support from employees, and unions are intimately

familiar with methods by which employees are persuaded to support the union. Indeed, this Union had used such methods effectively at CMS in April 1970 when it obtained its original certification.

In contrast to the union's burden, the employer faces an insurmountable burden in acsertaining its employees' sentiments. For example: (1) according to the Board, an employer may not poll its employees to ascertain their union sympathies unless it can establish the same evidence that is required to withdraw recognition (*i.e.*, objective evidence sufficient to establish a reasonable good faith doubt of the union's majority) *Buckley Broadcasting (Station KKHI II)*, 291 N.L.R.B. No. 130 (Nov. 13, 1988); *Boaz Carpet Yarns*, 280 N.L.R.B. No. 4 (1986); (2) an employer may obtain a Board decertification election only by establishing the same evidence (*i.e.*, a reasonable good faith doubt); therefore, if an employer files a petition for a decertification election based upon the hiring of a new work force of permanent replacements, it is clear that the Board, applying its *Station KKHI* rule would dismiss the petition. Brief for Petitioner at n.1; *NLRB v. Financial Inst. Employees of Am.*, 475 U.S. 192 at 198; (3) if the union files an unfair labor practices charge, it would act as a "blocking charge" to prevent processing of the decertification petition. *Briggs Plumbingware, Inc. v. NLRB*, 877 F.2d 1282, 1290 (6th Cir. 1989); *Automated Business Sys.*, 205 N.L.R.B. 532 at 533 n.6.

Furthermore, under the Board's *CMS* decision, the Union's purported acceptance of the May 25th offer was effective to create a collective bargaining agreement. Pet. App. 36a-38a. Therefore, due to the Board's "contract bar" rule, neither CMS nor its employees could have obtained a Board election until the new contract expired.

NLRB v. Financial Inst. Employees of Am., 475 U.S. 192, 196, n.3 (1986); *Georgia Purchasing, Inc.*, 230 N.L.R.B. 1174 (1977) ("contract bar rule" applied to decertification petition filed by employees).[33]

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33. The Board may argue that CMS should not seek to vindicate the Section 7 rights of its employees. However, because decisions of the Board and of this Court express concern for such rights, it is appropriate for CMS to advance arguments based on such precedent. *Fall River*, 482 U.S. at 2233, 2244; *NLRB v. International Ladies Garment Workers Union*, 366 U.S. 731, 738 (1961); *Terrell Mach. Co.*, 174 N.L.R.B. 1480 (1969), *enforced*, 427 F.2d 1088 (4th Cir. 1970), cited by this Court in *Fall River*, 482 U.S. at 2233, and also cited by the Board in *Station KKHI*, Pet. App. at 61a n.5, was decided at a time when the Board followed its historical treatment of replacements. Thus, at the time *Terrell* was decided the Board and courts were striking the policy balance in favor of protecting unit employees against a minority union, by finding that the employer may doubt that replacements support the union.

CONCLUSION

For each of the foregoing reasons, the judgment of the court of appeals should be affirmed.

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NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

CURTIN MATHESON SCIENTIFIC, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 88-1685

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

CURTIN MATHESON SCIENTIFIC, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

INTRODUCTION

This case involves the validity of a Board rule governing the circumstances under which an employer may withdraw recognition from the duly certified bargaining-unit representative of its employees. The underlying principles are well-established and, for the most part, undisputed: "First, after a union has been certified by the Board as a bargaining-unit representative, it usually is entitled to a conclusive presumption of majority status for one year following the certification. * * * Second, after this period, the union is entitled to a rebuttable presumption of majority support." *Fall River Dyeing & Finishing Corp.* v. *NLRB*, 482 U.S. 27, 37-38 (1987). To rebut

that presumption, an employer may show either (1) that the union did not in fact enjoy majority status, or (2) that there was a sufficient, objective basis for a reasonable doubt of the union's majority status. *Id.* at 41 n.8.[1]

The question in this case is whether an employer carries its burden to prove a reasonable doubt of the union's majority status by showing only that one-half or more of the bargaining unit consists of striker replacements who have crossed a picket line to get to work. The Board's "no-presumption" rule states that such proof is insufficient. Under the Board's rule, an employer must adduce additional evidence of the replacements' union sentiments in order to establish an objective basis for a good faith doubt of majority

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[1] Amicus curiae AFL-CIO (Br. 5-8, 13-25) contends that an employer should not be entitled to withdraw recognition on the basis of a good faith doubt. In its view, only a Board election that demonstrates an actual loss of majority status can justify withdrawal of recognition. But since none of the parties in this case challenged the appropriateness of a good faith doubt defense in the Board proceedings or in the court of appeals, and the issue was not raised as a question in the petition for certiorari, the question should not be considered. See *United Parcel Service, Inc.* v. *Mitchell*, 451 U.S. 56, 60 n.2 (1981); cf. *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645, 665-666 (1982).

In any event, amicus has offered no compelling reason for re-examining the propriety of the good faith doubt defense. An employer's good faith doubt of an incumbent union's majority status has been a lawful basis for withdrawing recognition since the Board first announced the rule in *Celanese Corp. of America*, 95 N.L.R.B. 664, 671-673 (1951). The principle has been unanimously endorsed by the courts of appeals, and this Court has cited it with approval. See *Fall River Dyeing*, 482 U.S. at 41 n.8; *Brooks* v. *NLRB*, 348 U.S. 96, 101 (1954); Resp. Br. 26 n.22 (citing cases).

support. For the reasons stated in our opening brief, the Board's rule is a rational construction of the National Labor Relations Act, grounded in a sensible empirical judgment as well as in important statutory policies.

The only issue before the Court is whether the Board's rule is a reasonable one—whether the Board has reasonably concluded that withdrawal of recognition must be based on more than the solitary fact that replacements equal or outnumber other employees in the bargaining unit, and that they have crossed a picket line to come to work. The decision of the court of appeals, reversing the Board, held that a finding of good faith doubt was *compelled* by such a showing. On that basis—and that basis alone—the court denied enforcement of the Board's order in this case.[2]

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[2] On the date recognition was withdrawn, there were 49 employees in the bargaining unit, 25 of whom were permanent replacements (see Pet. App. 3a). That the decision of the court of appeals rested on its rejection of the no-presumption rule with respect to those replacements is made clear in the majority opinion (*id.* at 10a):

> We hold that the Company was justified in doubting that the striker replacements supported the Union in this context. Over eighty percent of the bargaining unit work force * * * was replaced on June 25, 1979. Where such a substantial percentage of the bargaining unit employees is replaced on the same day, and the striker replacements cross a picket line, violent or not, to report to work each day, the Company is justified in counting the striker replacements as employees whom they doubt support the Union.

As Judge Williams noted in dissent (*id.* at 12a): "The outcome of this case turns on the significance attached to the hiring of permanent replacements during an economic strike." Indeed, in earlier proceedings respondent's counsel likewise recognized that the lawfulness of the no-presumption rule

1. We restate these propositions to highlight how little of the question presented respondent and its amici have chosen to engage. Indeed, the opposing briefs in this case labor at length to establish points that are not even at issue.[3]

Respondent's principal submission (Br. 9-20) is that, as an empirical matter, replacements generally do not support the union. Respondent and the Chamber of Commerce attempt to establish that proposition by showing, *inter alia*, that unions usually seek the discharge of replacements in a strike settlement agreement; that unions have historically viewed replacements as "scabs"; and that at one time the Board had permitted employers to presume that replacements would not support the union (Br. 11-15; Chamber Br. 11-16).

It may well be that the Board could reasonably have adopted the rule urged by respondent and its amici—that replacements presumptively oppose the incumbent union. The question presented, however, is whether the Board's current approach—that the employer's burden is not satisfied simply by showing that 50% or more of its employees are replacements

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is the only relevant issue. Responding to an inquiry from a Board investigator, counsel explained: "Essential to the Company's refusal [to recognize and bargain with the Union] is the presumption that the replacements do not support the Union" (J.A. 131).

[3] For example, respondent contends (Br. 35-40) that, even without the benefit of the Gorman presumption, the evidence adduced below was sufficient to justify withdrawal of recognition. The court below did not, however, decide that question, and it is not presented here. Whether the evidence was sufficient, apart from the Gorman presumption, may be resolved by the court of appeals on remand from this Court.

who crossed a picket line—commands rational support. It plainly does.[4]

As we showed in our opening brief (Br. 16-19), the Board reached the reasonable empirical judgment that not all strikes are alike and that not all replacements are motivated by the same considerations. Some strikes are doubtless marred by acrimony and violence (see Resp. Br. 12-16; Chamber of Commerce Br. 11-16); others, notably including the strike in this case, are not.[5]

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[4] Deference is owed decisions of the Board even where the Board's position represents a change from prior policy. *NLRB* v. *Local 103, Ironworkers*, 434 U.S. 335, 351 (1978); *NLRB* v. *J. Weingarten, Inc.*, 420 U.S. 251, 265-266 (1975). But contrary to the assertion of respondent (Br. 16-20) and amicus Chamber of Commerce (Br. 7), the Board's current view, enunciated in *Station KKHI* (Pet. App. 58a-78a), does not represent a radical departure from prior Board law. As shown in our opening brief (at 4-5), the Board began in the mid-1970's to move away from its previous view that striker replacements undoubtedly oppose representation by the incumbent union. The Board's current position is based on its evolving understanding of industrial reality. It is also consistent with the decisions of two courts of appeals that criticized the Board's transitional view that striker replacements should be presumed to support the incumbent union in the same ratio as the original vote in the Board's representation election. See *NLRB* v. *Windham Community Memorial Hosp.*, 577 F.2d 805 (2d Cir. 1978); *NLRB* v. *Pennco, Inc.* 684 F.2d 340 (6th Cir.), cert. denied, 459 U.S. 994 (1982).

[5] In its statement of facts, respondent (Br. 4) erroneously asserts that the "replacements had to cross a hostile picket line to report for work." Although respondent made such an assertion in support of its motion for summary judgment (J.A. 135), it offered no testimony on that point at the unfair labor practice hearing after summary judgment was denied. Indeed, the evidence adduced at trial indicates that the picket

Similarly, striker replacements may cross a picket line for any number of reasons; hostility to the incumbent union may not be among them. As the Board pointed out in *Station KKHI* (Pet. App. 75a), replacements may be motivated by economic pressures or opposition to a particular strike, but may still desire union representation.[6] Accord *Hajoca Corp.* v. *NLRB*, 872 F.2d 1169, 1172 (3d Cir. 1989); *NLRB* v. *Pennco, Inc.*, 684 F.2d 340 (6th Cir.), cert. denied, 459 U.S. 994 (1982); *NLRB* v. *Windham Community Memorial Hosp.*, 577 F.2d 805, 813 (2d Cir. 1978).[7]

Respondent (Br. 15 n.12) and the Chamber of Commerce contend (Br. 11-12 & n.17) that the no-presumption rule is inconsistent with the Board's decisions in *Service Elec. Co.*, 281 N.L.R.B. 633, 642 (1986), and *Leveld Wholesale, Inc.*, 218 N.L.R.B. 1344, 1350-1351 (1975). In those cases, the Board

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line was maintained in an uneventful manner; there is no indication that those who crossed it were subjected to any hostility (see Pet. App. 49a-50a).

[6] The present case illustrates the point. As Judge Williams noted in dissent (Pet. App. 23a-24a), in respondent's interviews with a majority of the replacements, only one comment indicated opposition to the Union. See Pet. Br. 19.

[7] See also *Cooperativa de Credito y Ahorro Vegabajena*, 261 N.L.R.B. 1098, 1099 n.7 (1982) (striker replacement joined strike three months after accepting employment); *Hajoca Corp.*, 291 N.L.R.B. No. 16 (ALJ Sept. 30, 1988), slip op. 8, 12 (out of two replacements in drivers' unit, one was a "lifetime member" of the incumbent union and the other a member at previous job); *Osteopathic Hosp. Founders Ass'n* v. *NLRB*, 618 F.2d 633, 637-638 (10th Cir. 1980) (applicants for replacement positions were members of incumbent union); *Drug Package Co.*, 228 N.L.R.B. 108 (1977), enforcement denied on other grounds, 570 F.2d 1340 (8th Cir. 1978) (same).

held that a union's primary loyalty during a strike is to the strikers, and, accordingly, that an employer has no obligation to bargain with a striking union over the wages and working conditions of replacements. Those cases indeed recognize the possible tension between a striking union and replacements; but they do not require the Board to adopt a presumption that replacements oppose the incumbent union, for purposes of an employer's decision to withdraw recognition.[8]

Respondent's reliance (Br. 22-26) on the legislative history of Section 9(c)(3) of the Act, 29 U.S.C. 159(c)(3), is similarly unpersuasive. As explained in our opening brief (at 22-23 n.13), Congress amended Section 9(c)(3) in 1959 to permit unreinstated economic strikers, as well as replacements, to vote in an election conducted within twelve months after commencement of a strike. That amendment reflected Congress's desire to foster stability during the course of a strike.[9] The Board's no-presumption rule is entirely responsive to the same concern. To be sure, as respondent notes, there were several statements during the legislative process that replacements

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[8] In addition, once a strike is over and job rights are resolved, a union's initial stance toward the replacements may ameliorate. At that point, moreover, the union has an obligation to represent all unit employees fairly. See, *e.g.*, *Dold Foods*, 289 N.L.R.B. No. 156 (July 28, 1988). See also *Johns-Manville Sales Corp.*, 289 N.L.R.B. No. 40 (June 27, 1988), slip op. 12 n.11.

[9] As Representative Griffin explained, the purpose of the amendment was to prevent the "unscrupulous employer" from "provok[ing] a strike, hir[ing] replacements and then hav[ing] a quickie election to oust the union." 2 NLRB, *Legislative History of the Labor-Management Reporting and Disclosure Act of 1959*, at 1522, 1534 (1959).

may be hostile to a striking union. Those remarks do not, however, foreclose the Board's conclusion that, as an empirical matter, such sentiments may not hold for all replacements in all circumstances, and that the replacements' views may in any event change at the end of a strike.

2. Although respondent and its amici contend, at length, for the empirical validity of the Gorman presumption, they ignore the policy considerations that played a significant part in persuading the Board to reject it.

a. The no-presumption rule promotes the stability of collective-bargaining relationships (see Pet. Br. 19-27). By requiring the employer to establish the replacements' views on a case-by-case basis, the no-presumption rule limits the employer's ability to oust the incumbent union simply by replacing a sufficient number of striking employees. By contrast, the presumption that striker replacements oppose the union creates incentives for employers to stonewall negotiations, hire unnecessary replacements, and withdraw recognition from the bargaining representative. The Gorman presumption would also tend to chill the exercise of the statutory right to strike by imposing the risk of loss of representation—in addition to the loss of a job—if the strike were unsuccessful.

b. Respondent does not contest those policy judgments. Together with the Chamber of Commerce (Br. 17-23, 26-29), however, respondent contends (Br. 41-45) that the Board's no-presumption rule disserves the policy of employee free choice in the selection or rejection of a bargaining representative. Respondent reasons that although the employer is free to marshal evidence concerning the replacements' sentiments and thereby to establish its good faith

doubt of the union's majority status, such evidence is difficult to obtain and an employer cannot petition for a decertification election without it.[10] Respondent also asserts that while the employees, including the striker replacements, may petition for a decertification election by showing that 30% of the employees support the petition,[11] the union can easily block that petition by accepting the employer's last offer, or by filing an unfair labor practice charge against the employer. In respondent's view, the statutory policy of employee free choice would be better effectuated by permitting the employer to withdraw recognition when, as here, it has hired replacements for a majority of the strikers; at that point, respondent asserts, the burden should shift to the union—which is in a better position to determine the sentiments of the replacements—to establish in a Board election that it still commands majority support.

Respondent's effort to impose this regime on the Board is flawed in three respects.

i. A rule compelling a finding of good faith doubt on a showing that one-half or more of the employees were permanent replacements would, as respondent suggests, substantially lighten the employer's burden.[12] But the Board's refusal to embrace such a rule

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[10] See *United States Gypsum Co.*, 157 N.L.R.B. 652, 655-656 (1966).

[11] See 29 C.F.R. 101.18(a).

[12] In the almost 40 years since the decision in *Celanese* (note 1, *supra*), numerous Board and lower court decisions have made clear that an employer cannot withdraw recognition without considerably more than a "subjective" doubt; rather, good faith doubt requires "empirical and objective" evidence sufficient to support a reasonable belief that the union has lost its majority support. *NLRB* v. *Tahoe Nugget, Inc.*, 584

is justified by the Act's "overriding policy" of " 'industrial peace' "—a policy that is promoted by "stability in collective bargaining relationships." *Fall River Dyeing*, 482 U.S. 38.[13] The more easily an em-

F.2d 293, 299, 301 (9th Cir. 1978), cert. denied, 442 U.S. 921 (1979). Accord *NLRB* v. *Koenig Iron Works, Inc.*, 681 F.2d 130, 137-144 (2d Cir. 1982). Nor is it surprising that the evidence must be so substantial. The inquiry, after all, is designed to determine not the employer's state of mind, but the state of employee support for a duly recognized bargaining representative.

But contrary to respondent's contention (Br. 28-35), the good faith doubt and minority-in-fact tests have not merged either in theory or in practice. The latter test requires a numerical showing; the former allows for circumstantial evidence. (For examples of cases in which the Board has relied on such evidence in upholding an employer's claim of good faith doubt, see *IT Services*, 263 N.L.R.B. 1183 (1982); *Stormor, Inc.*, 268 N.L.R.B. 860 (1984)). The type and quantum of evidence that would satisfy the good faith doubt test are determined by the Board on a case-by-case basis, subject to review by the courts of appeals. As the Board explained in *Station KKHI* (Pet. App. 76a) and in this case (*id.* at 33a), however, "events * * * common to the hiring of replacements," such as crossing a picket line or the union's failure to contact replacements during the strike, are not sufficient to support a good faith doubt. See also *Johns-Manville Sales Corp.*, 289 N.L.R.B. No. 40 at 12 (June 27, 1988). But cf. *Bickerstaff Clay Products Co.* v. *NLRB*, 871 F.2d 980 (11th Cir. 1989), cert. denied, No. 89-144 (Oct. 16, 1989). For purposes of this case, the Court need not determine the full range of evidence that would satisfy the good faith doubt test, but only whether the Board was reasonable in concluding that the test is not satisfied merely by showing that striker replacements comprise a majority of the unit of employees, and that they crossed a picket line to get to work.

[13] For that reason, the Chamber of Commerce's reliance (Br. 28), on *Linden Lumber Div.* v. *NLRB*, 419 U.S. 301 (1974), is misplaced. *Linden* involved the initial recognition of a union. In that setting, unlike this one, the interest in

ployer may establish a basis for withdrawing recognition, the more stability is threatened; indeed, this Court has acknowledged the danger that "[t]o allow employers to rely on employees' rights in refusing to bargain with the formally designated union" would be "inimical" to industrial peace. 482 U.S. 50 n.16.[14] An employer who could withdraw recognition as soon as it hired enough replacements would be encouraged to stonewall negotiations until that point is reached, instead of bargaining with the union in an effort to reach a new agreement.

ii. As the Chamber of Commerce notes (Br. 17-18), an employer may not poll its employees concerning their union sympathies without having a good faith doubt of the union's majority status. See *Texas Petrochemicals Corp.*, 296 N.L.R.B. No. 136 (Sept. 29, 1989). But an employer *is* entitled, as respondent did here (Pet. App. 23a-24a; J.A. 58-59, 98-100, 165-170), to make non-coercive inquiries as to the employees' concerns about the job. Moreover, contrary to respondent's assertion (Br. 43-44; see also Chamber of Commerce Br. 17-20), the union is not necessarily in a superior position to assess the likely desires of replacements concerning representation. The union does not know the replacements or have ready access to their names and addresses during the strike. Nor

determining representation in an election need not be weighed against a countervailing interest in stability.

[14] Accord *NLRB* v. *Tahoe Nugget, Inc.*, 584 F.2d 293, 301 (9th Cir. 1978), cert. denied, 442 U.S. 921 (1979) (since the employer seeks unilaterally to alter the status quo, "the burden is fair," even assuming "the employer usually does have inferior access to the relevant information and may risk penalty in garnering additional data"); *Retired Persons Pharmacy* v. *NLRB*, 519 F.2d 486, 489-491 (2d Cir. 1975).

would the replacements be likely to volunteer information to the union during the strike; to the contrary, they would be more likely to give such information to the employer.

iii. Finally, respondent (Br. 44-45) and the Chamber of Commerce (Br. 22) overstate the effect of the "contract bar rule" on the ability of striker replacements to challenge the incumbent union's majority status. Under that rule, representation petitions, including decertification petitions, will generally not be processed during the term of a collective-bargaining agreement. See, *e.g.*, *Local 1545, United Bhd. of Carpenters* v. *Vincent*, 286 F.2d 127, 130-131 (2d Cir. 1960). But only a written and signed agreement is valid for contract bar purposes. *Appalachian Shale Products Co.*, 121 N.L.R.B. 1160, 1161-1164 (1958). See also *Valley Doctors Hosp.*, 222 N.L.R.B. 907 (1976). In the present case, for example, the employees were free to file a decertification petition unless and until respondent signed a document signifying that an agreement had been reached. Moreover, subject to the requirement of good faith, an employer is free to modify or withdraw a bargaining proposal. See, *e.g.*, *Pennex Aluminum Corp.*, 271 N.L.R.B. 1205, 1205-1206 (1984); *Salinas Valley Ford Sales, Inc.*, 279 N.L.R.B. 679, 689-691 (1986). In short, once a prior contract is no longer a bar, employees (including replacements) may file a decertification petition at any time before a new agreement is reduced to writing and signed.[15]

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[15] As respondent (Br. 44) and the Chamber of Commerce (Br. 18 n.28) note, under the Board's "blocking charge" rule the filing of an unfair labor practice charge alleging an unlawful withdrawal of recognition will ordinarily halt the processing of an election petition, including a decertification petition. NLRB Casehandling Manual (Part Two) Sec. 11730.3 (Apr. 1984); *NLRB* v. *Big Three Indus., Inc.*, 497 F.2d 43, 51-52 (5th Cir. 1974). Contrary to the assertion of the Chamber of Commerce (Br. 18 n.28), however, it does not take "months or even years" for the General Counsel to determine whether a charge has merit; the median time currently is 46 days. 52 NLRB Ann. Rep. 250 (1989). Moreover, were the charge found to be meritorious and a complaint issued, it is consistent with the policies of the Act that no election be held until the employer's unfair labor practices are remedied. Cf. *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575 (1969).

3. a. Quoting from *NLRB* v. *Insurance Agents' Int'l Union*, 361 U.S. 477, 497 (1960), the Chamber of Commerce contends (Br. 25) that in adopting the no-presumption rule, the Board improperly acted " 'as an arbiter of the sort of economic weapons the parties can use . . . .' " Amicus misreads the *Insurance Agents'* case. There, the Court concluded that a union had not breached its duty to bargain in good faith when it engaged in economic pressure during negotiations and without declaring a formal strike. In refusing to enforce a cease-and-desist order, the Court faulted the Board for attempting to impose "some standard of properly 'balanced' bargaining power * * *" (361 U.S. 497). The Court concluded that, to permit the Board to "sit in judgment upon every economic weapon the parties to a labor contract negotiation employ, judging it on the very general standard" of Section 8(b)(3), 29 U.S.C. 158(b)(3), would amount to "the Board's entrance into the substantive aspects of the bargaining process to an extent Congress has not countenanced" (*id.* at 497-498).

In the present case, by contrast, the Board has not sought simply to strike a balance with respect to the

use of economic weapons.[16] It has, instead, determined the permissible grounds on which an employer may respond to protected activity (an economic strike) by withdrawing from the union a status conferred by the Act and regulated by the Board. In that setting, the Board's exercise of its expert judgment is entirely appropriate. See generally *Fall River Dyeing & Finishing Corp.* v. *NLRB*, 482 U.S. 27 (1987).

b. Similarly misplaced is respondent's reliance (Br. 20-21) on *NLRB* v. *Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939). The central issue in *Fansteel* was whether an employer could be required to reinstate unfair labor practice strikers who had been discharged for engaging in an unlawful sit-down strike. The Court held that reinstatement could not be required; it then summarily concluded that, with the discharged employees excluded from the bargaining unit, the union could no longer claim a right to recognition by virtue of its one-time apparent majority.

Fansteel differs from the present case in two principal respects. First, at the time *Fansteel* was decided, the Board had not yet developed its present-day rules governing the withdrawal of recognition—rules that are involved in this case. Second, although the union in *Fansteel* had at one time apparently enjoyed majority support, no certification or recognition had occurred; indeed, that was the cause of the sit-down strike. There was, accordingly, no stable, established

[16] Even in the area of such economic weapons, this Court has recognized the Board's authority to prohibit tactics that are inherently destructive of interests that the Act is designed to protect. See *NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221 (1963).

bargaining relationship that called for the protection afforded by the rules at issue here.

c. Respondent likewise errs in relying (Br. 21-22) on *NLRB* v. *Burns Int'l Security Services, Inc.*, 406 U.S. 272 (1972). In *Burns*, the Court held that a "successor" employer is required to bargain with the union that represented its predecessor's employees. The Court noted, however, that the case "would be a wholly different [one]" if the successor "had not hired [a majority of] employees already represented by a union" (*id.* at 280). Relying on that qualification, respondent contends that where, as in the present case, the majority of a bargaining unit consists of striker replacements, an employer should be free to refuse to bargain with the union.

Burns does not support respondent's contention. In *Burns* and other successorship cases, the question is whether the successor employer's new workforce retains a sufficient relationship to the predecessor's workforce to justify requiring the successor to recognize and bargain with the union that represented the predecessor's employees. Where, for example, the successor, acting in good faith, hires a workforce that is substantially unrelated to the predecessor's workforce—and which has therefore had no prior relationship to the union that represented the predecessor's employees—there is no basis for requiring the successor to recognize and bargain with the union. Since the successor and the predecessor are different entities, and the workforce too is different, there is simply no bargaining relationship to protect. Where, on the other hand, an existing employer hires replacements for striking workers, there *is* an ongoing bargaining relationship—a relationship that the statute seeks to protect. The no-presumption rule ensures that the

employer cannot dissolve that ongoing relationship solely by replacing a sufficient number of the striking employees.

* * *

For the foregoing reasons, and for the reasons stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* SUPPORTING PETITIONER

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 88-1685

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

CURTIN MATHESON SCIENTIFIC, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* SUPPORTING PETITIONER

This brief *amicus curiae* of the American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"), a federation of 87 national and international labor organizations with a total membership of approximately 13,000,000 working men and women, is filed with the consent of the parties, as provided for in the Rules of this Court.

SUMMARY OF ARGUMENT

The litigants in this case have assumed the validity of the Board rule, first announced in *Celanese Corporation of America*, 95 NLRB 664 (1951), excusing an employer's refusal to bargain with the union certified as the em-

ployees' exclusive representative if the employer reasonably believes that the union no longer represents a majority of the employees. In this brief we argue that this Court's recent decisions and their rationale show that the *Celanese* rule simply cannot bear reasoned scrutiny. If an employer doubts the continued majority support of an incumbent union, the employer must seek decertification of the union through a Board conducted election, and continue to bargain with the union unless and until the union is declared by the Board no longer to be the exclusive representative.

1. The *Celanese* rule was developed shortly after the Board announced, in *Joy Silk Mills, Inc.*, 85 NLRB 1263 (1949), *enforced as modified*, 185 F.2d 732 (D.C. Cir. 1950), *cert. denied*, 341 U.S. 914 (1951), that in initial recognition situations, an employer could refuse to bargain so long as the employer had a "good faith doubt" of the union's majority support, and the *Celanese* rule explicitly rests on the *Joy Silk Mills* rule. In the initial recognition situation, however, *Joy Silk Mills* has been abandoned, and employers are now entitled to insist upon a union-instigated Board conducted election before incurring any obligation to bargain. *Linden Lumber Division v. NLRB*, 419 U.S. 301 (1974).

The considerations underlying the *Linden Lumber* holding were several. First, a Board conducted election is a method superior to other available options for determining the true sentiments of employees as to union representation. An election provides an unambiguous answer to the representation question, guards against the influence of both peer and employer pressure, and is more likely to foster an informed choice. Second, nothing in the statute mandates inquiry into an employer's "scienter" in refusing to bargain, and such an inquiry is inherently likely to lead to litigation complexity and therefore to delays. And third, it makes sense to place upon the party seeking to alter the existing form of industrial governance the burden of showing the need for that change.

2. Although the Board has not reexamined the *Celanese* rule in light of *Linden Lumber*, this Court's cases indicate that the principles for certifying a union established in *Linden Lumber* similarly mandate that, where the question is *de*certifying a union, such decertification is to occur only through the Board's formal processes, invoked by those seeking to alter the extant system of industrial governance.

The NLRA does not provide that a certification of a union as exclusive representative expires after any particular length of time, or upon the occurrence of any specified event. Instead, the statute, as construed in *NLRB v. Financial Institution Employees* (*"FIEA"*), 475 U.S. 192 (1986), makes a certification valid unless and until an individual or group seeking to declare it invalid presents to the Board a proper petition for a Board-conducted election and prevails in that election. This construction of the statute is fully consistent with *Linden Lumber*, and entirely *inconsistent* with the *Celanese* rule applied in this case.

First, the reasons for viewing a Board election as superior to alternative means of determining employee sentiment as to union representation—accuracy, insulation against outside pressures, and exposure to the competing contentions—are as applicable in the decertification context as in the certification situation. Moreover, as this Court has held (*Brooks v. Labor Board*, 348 U.S. 96 (1954)), there is no justification whatever for treating initial recognition as a weighty matter requiring formal procedures, while permitting the destruction of an established bargaining relationship through informal means. To the contrary, the statute affirmatively favors the continuation of established bargaining relationships.

Second, nothing in the statute sanctions an employer refusal to bargain with a union that *does* command ma-

jority support simply because the employer, reasonably or not, believes otherwise. Nor does the statute suggest such a lessened standard on the ground that an employer refusal to bargain is an essential method of promoting employee freedom of choice: A group of employees can upon a proper showing file their own decertification petition if they so choose. Moreover, there is nothing fundamentally unfair about eliminating a scienter test in the failure to bargain situation: Employers can file decertification petitions upon a proper showing if they truly doubt union majority support. And, even if an employer does bargain with a minority union, only a remedial order, and no penalty to the employer, ensues.

Third, only the requirement that those seeking to disestablish the union must bear the burden for demonstrating the basis for doing so is consistent with the statutory interest in the continuity of existing bargaining relationships. Permitting the self-help method sanctioned by the *Celanese* rule, when the statute makes such self-help entirely unnecessary, creates as a practical matter an incentive for employers to disrupt existing bargaining relationships: Even if the employer is eventually found to have committed an unfair labor practice, during the time consumed in litigation no bargaining has occurred, and the union has not functioned as the exclusive representative. Recognizing that such a regime encourages employer actions inconsistent with the statute, this Court has consistently disapproved employer self-help as a way of resolving employee representation issues. *E.g. Brooks v. Labor Board, supra*; *FIEA, supra.*

Given these considerations, it is clear that the employer in this case committed an unfair labor practice when, without filing a petition for a Board conducted decertification election and awaiting the result, the employer refused to bargain with the union that was the certified representative of the employees.

ARGUMENT

Introduction

Put most starkly, the question before this Court in this case is whether an employer, may, consistent with §§ 8(a)(5) & 9(a) of the National Labor Relations Act, as amended, refuse to bargain with the incumbent union when the number of permanent replacements hired during a strike exceeds the number of strikers.[1] The dialogue on this question in the courts of appeals, and before this Court has not put the matter in such straightforward terms. Rather, the question posed has been whether an employer may *presume* that striker replacements do not desire to be represented by the incumbent union, and on the basis of that presumption may treat the union as one that no longer enjoys majority support.[2]

The discussion has proceeded in this fashion because all participants have accepted the validity of the National Labor Relations Board's (NLRB) rule that, as a general matter, an employer's *doubt* that a union previously certified as an exclusive bargaining representative after a Board conducted representation election continues to enjoy the majority support of the employee group can provide a legally sufficient basis for refusing to bargain with the union whether or not the union does *in fact* have majority support. *See Celanese Corporation of America,*

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[1] Section 8(a)(5) makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees, subject to the provisions of [§ 9(a)]." Section 9(a), in turn, provids that "[r]epresentatives designated or selected for the purposes of collective bargaining by the majority of employees in a unit appropriate for such purposes, shall be the exclusive representative . . . for the purpose of collective bargaining."

[2] The precise problem involved in this case arises because, under the NLRA, both strikers and their permanent replacements, if any, are statutory employees and, at least for the first year after the commencement of a strike, both are entitled to have their views as to union representation considered. NLRA §§ 2(3) & 9(c)(3).

95 NLRB 664 (1951) (employer's refusal to continue to recognize an incumbent union is not unlawful if employer can demonstrate a good faith belief, reasonably and objectively based, that the union no longer has majority support.)[3]

As a result, the arguments in this case—and the decisions of the lower courts and of the Board in similar cases—have centered upon whether it is appropriate to regard certain employee actions under certain sets of circumstances (in this instance, taking a job as a striker replacement) as a *proxy* for direct evidence that the employee does not desire union representation. The discussion has been one based on "guesstimates".

In the circumstances of this case, for example, the Board, and the court below have debated the likely union sentiments of striker replacements.[4] The Board has at times surmised that striker replacements generally do not support the union, and at other times surmised that replacements do so in the same proportion as the prestrike employee complement. *Compare Titan Metal Mfg. Co.*, 135 NLRB 196 (1962), *with, e.g., Pennco, Inc.*, 250 NLRB 716 (1980), *enforced on other grounds*, 684 F.2d 340 (6th Cir.), *cert. denied*, 459 U.S. 994 (1982). And the Board now abjures both "guesses" and requires evidence on the striker replacements' desire for continued representation in addition to the fact of their taking the jobs in question.[5] The Board, however, continues to per-

[3] The *Celanese* rule has undergone various permutations over the years. See pp. 8-10 & n.7, *infra*.

[4] *See also* Petition for a Writ of Certiorari at 11-14; Reply Memorandum for the Petitioner at 3 (discussing the numerous other court of appeals' decisions addressing the question). As we explain below, at least part of the uncertainty on whether striker replacements "support" or "do not support" the incumbent union stems from the certainty that "union support" has proved to be an elusive concept. *See* pp. 17-18, *infra*.

[5] As the Board recognized in adopting its current position, working during a strike is, to be sure, an indication that an employee is less likely than other employees to desire union representation, but is *not* sufficient in itself to give rise to a *factual* presumption that the employee does not desire continued union representation. "[A]n employee may be forced to work for financial reasons, or may disapprove of the strike in question but still support union representation . . . and other union initiatives." *Buckley Broadcasting*, 284 NLRB No. 113 (1987), Pet. App. at 75a.

mit employers to decline to bargain with an incumbent union *without* proving through direct, rather than circumstantial, evidence that the union indeed lacks majority support and *without* going through a Board conducted decertification election.

In this brief we argue that this entire approach is an anachronism, left over from an earlier era in which federal labor law jurisprudence took a very different view of several considerations critical to the proper resolution of this case. Among the considerations as to which contemporary doctrine varies from the earlier understanding are: the relevance of employer *scienter* in determining whether a refusal to bargain constitutes an unfair labor practice; the advisability of relying on expressions of employee sentiment on union representation other than the results of a Board conducted election; and the weight to be accorded the maintenance of industrial peace and stability.

This Court's most recent pronouncements on the calculus of these considerations in determining when a union's exclusive representative status is to be established and disestablished militate in favor of abandoning the "good faith doubt" approach altogether. *See Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27 (1987); *NLRB v. Financial Institution Employees of America* ("*FIEA*"), 475 U.S. 192 (1986) and *Linden Lumber Division* v. *NLRB*, 419 U.S. 301 (1974). These cases suggest—and, we believe, require—that the governing rule of law here is that an established bargaining relationship is to be maintained unless and until the em-

ployer (or an independent group of employees) is able to persuade the NLRB that there is indeed a "question concerning representation" meriting a Board conducted election, and the employees voting in that election choose to decertify the union. Under this regime, the *employees' actual desires*, and *not* the *employer's belief* as to those desires, are the determining factor with regard to the incumbent union's status as an exclusive representative. And, of equal importance, the employees' desires are ascertained in the manner this Court has determined to be the Act's preferred manner; *viz.*, a Board conducted election. This means that established bargaining relationships are not first undone by employer self-help and then litigated about afterwards.

Having said this much by way of introduction, we now review the historical background to the "good faith doubt" defense to a refusal to bargain charge and then turn to an analysis of the current Board law.

1. *Historical Background*: The rule allowing an employer to refuse to bargain if he or she, in good faith, doubts a union's majority support originated in two roughly contemporary Board decisions. *Joy Silk Mills, Inc.*, 85 NLRB 1263 (1949), *enforced as modified*, 185 F.2d 732 (D.C. Cir. 1950), *cert. denied*, 341 U.S. 914 (1951) and *Celanese Corp., supra.*

In *Joy Silk Mills*—which dealt with a union demand for *initial* recognition—the Board held that an employer "may in good faith insist on a Board election as proof of the Union's majority but that [the employer] 'unlawfully refuses to bargain if its insistence . . . is motivated, not by any *bona fide* doubt . . ., but rather by a rejection of the collective bargaining principle or by a desire to gain time within which to undermine the union.'" 85 NLRB at 1265.

The law governing the situation in which an employer refuses to bargain with an *incumbent* union after an

economic strike, and defends its refusal to bargain by asserting a good faith doubt as to the union's continued majority status, has gone through two stages.

Initially, the Board held that an employer could *not* repudiate an existing bargaining relationship on the basis of either a subjective belief of a decline in union support or circumstantial evidence indicating, but not demonstrating, that the union no longer has majority support. As the Board put it in *United States Gypsum Co.*, 90 NLRB 964, 966 (1950):

> Even if we accept as true all the circumstances set forth by the Respondent, they do not establish that the employees desired to withdraw their designation of the Union as their bargaining representative. The Act provides the methods whereby employees who wish to change or eliminate their bargaining representative may do so through Board processes by means of a . . . decertification petition. No such petition has been filed by Respondent's employees.
>
> The Act also provides the method whereby an employer who, in good faith, doubts the continuing status of his employees' bargaining representative may resolve such doubt by filing an employer petition. This the Respondent failed and refused to do . . . Nor is there any merit to the Respondent's position that, as the Union was seeking recognition, it was incumbent upon the Union to seek Board certification again. Once employees have designated their bargaining representative in accordance with the Act, recognition of that representative is not a matter which an employer may or not grant when and as he chooses. A duty to bargain with such a duly designated representative has been imposed upon him by the Act. The Act also provides the method whereby such duty may be dissolved.

In *Celanese Corp., supra*, however, the Board held that beginning a year after a Board certification, while there is a presumption of the incumbent union's continuing majority status, that presumption may be rebutted not

by proof to the contrary, but by a mere "doubt[] [of] the union's majority, provided that the doubt is in *good faith*." 95 NLRB at 672 (emphasis in original).[6] The Board directly tied the *Celanese* rule to its *Joy Silk Mills* rule, stating it "could find no reason in law or policy which calls for the conclusion that a good faith doubt of majority is no defense to a refusal to bargain after the certificate year any more than is true in cases where there is no certificate." 95 NLRB at 672 n.16.[7]

In the initial recognition situation, of course, the "good faith doubt" approach has now been entirely abandoned. Instead, an employer faced with a union claim of majority support in an unrepresented bargaining unit may ordinarily ignore such evidence of that support as independently verified authorization cards or even majority participation in a recognitional strike. *Linden*

[6] During the first year after Board certification of a union, there is an irrebuttable presumption of continuing majority support. *Brooks v. Labor Board*, 348 U.S. 96 (1954). That presumption was recognized by the Board and affirmed by this Court in the interests of establishing stable bargaining relationships: without the year-long ban on challenges to the union's majority, newly certified unions would have to devote constant attention to proving majority status, and employers would be encouraged to delay reaching an agreement in the hope of eroding union strength. *Id.* at 99-100.

[7] In recent years, employers relying on the *Celanese* doctrine have been required to substantiate their claims with objective evidence which strongly indicates that the union does not have majority support. *E.g., Bartenders, Hotel, Motel and Restaurant Employers Association*, 213 NLRB 651 (1974). And the Board has been chary of showings based on such proxies for the employees' continued desire for union representation as employee turnover, union membership or financial support. *See, e.g., Wald Transfer & Storage Co.*, 218 NLRB 592 (1975).

At the same time, the Board adheres to the proposition that "*Celanese* . . . allows an employer to withdraw recognition, regardless of whether the union has majority status, in fact, if the employer can prove reasonably grounded doubt of that status based on objective considerations free of unfair labor practices." *Bartenders Etc. Ass'n.*, 213 NLRB at 654 n.21.

Lumber Co., supra; *see also NLRB v. Gissel Packing Co.*, 395 U.S. 575, 592-94 (1969).[8]

2. *Initiation of Bargaining Rights*: This Court has explained that there are several considerations that justify the rule that an employer who is faced with a union demand for recognition, and who has not committed any pervasive unfair labor practices likely to interfere with a Board-conducted election, may insist on such an election without any inquiry into whether the employer has an adequate good faith basis for disbelieving the union's claim of majority support.

First, the various alternatives to a Board-conducted election are "admittedly inferior to the election process." *Gissel*, 395 U.S. at 603. For one thing, employee expressions of union support other than in an actual election can be somewhat ambiguous in their import. Authorization cards are not always perfectly clear. *Gissel*, 395 U.S. at 604-609. And, "the fact that a majority of the employees strike and picket does not necessarily establish that they desire the particular union as their representative . . . [s]ympathy for strikers, not the desire to have the particular union in the saddle may [be the dominant] influence." *Linden Lumber*, 419 U.S. at 306. In both instances, an employee's apparent choice as to union representation may be "the result of group pressures and not individual decision." *Gissel*, 395 U.S. at 602; *see also Brooks v. Labor Board*, 348 U.S. at 99-100 (a secret

[8] There is no basis in the text of the statute for a rule that disputes over initial recognition are to be resolved only through a Board conducted certification election but disputes concerning the dissolution of a bargaining relationship are to be settled by employer self-help without a Board conducted decertification election.

NLRA § 9(a), after all, "expressly provides that the employees' exclusive bargaining representative shall be the union 'designated or selected' by a majority of the employees in an appropriate unit.'" *Linden Lumber*, 419 U.S. at 311 (Stewart, J., dissenting). And nothing in its legislative history directly supports the proposition that the Act requires Board conducted elections in the initial certification context. *Id.*, at 312-13.

ballot election elminates "the influence of mass psychology"). Finally, a decision made in a Board conducted election is more likely to be an informed choice, and therefore one more likely to abide the test of time, since the Board's processes assure that both the union and the employer have an opportunity to present their views to the electorate, and to respond to each other's claims. *Gissel*, 395 U.S. at 602.

Second, inquiry into an employer's frame of mind—either directly or through a "reasonable person" approach—is an inherently complex fact-bound endeavor likely to lead to lengthy litigation and delays, and an inquiry not consistent with the Act's language or ultimate purposes. *Linden Lumber*, 419 U.S. at 306; *Gissel*, 395 U.S. at 592-93. Just as there is "nothing in the statutory language [of NLRA § 8(a)(2)] prescribing *scienter* as an element of [that] unfair labor practice" (*Garment Workers' v. NLRB (Bernhard-Altmann Corp.)*, 366 U.S. 731 (1961)), so there is nothing in § 8(a)(5) suggesting that an employer's obligation to bargain turns in any way on his or her state of mind.[9]

Third, in the initial recognition situation, it is the union that is seeking to alter the existing form of industrial relations in the particular bargaining unit in question. That being so, the *Linden Lumber* Court determined that "in . . . getting on with the problems *of inaugurating* regimes of industrial peace" (419 U.S. at 307; emphasis added), it makes sense to place the burden of seeking a

[9] Neither NLRA § 8(a)(5) nor § 9(a) suggests that the obligation to bargain turns in any way either on the employer's *beliefs* as to the employees' desires concerning union representation or on the information available to the employer concerning the employees' desires. *See* p. 5, n.1, *supra* (setting out the statutory language). Section 8(d), which further defines the obligation to bargain, does refer to an obligation to "confer in good faith." That language, however, pertains to *how* bargaining is to be carried out, not *whether* bargaining is to begin.

Board election upon the union, as the party seeking to change the status quo (*id.* at 308-09).

3. *Revocation of Bargaining Rights*: Despite the common origin of the *Joy Silk Mills* rule, which was repudiated by the Board in the litigation culminating in *Linden Lumber*, *supra*, and the *Celanese* rule, the Board has not revisited the validity of the latter. The *Celanese* rule, however, is inconsistent with this Court's decisions from *Gissell*, *supra*, through *Fall River Dyeing*, *supra*, and the understanding of the Act's structure and purpose delineated in those decisions. As we now show, in failing to revisit and abandon the *Celanese* rule, the Board has erred, and as a result has needlessly complicated the law in this area.[10]

(a) As we have seen, the Act "empower[s] [the Board] to determine representation on petition of employees or the employer", *FIEA*, 475 U.S. at 198. If the Board determines "that a 'question of representation' exists . . . [the Board] directs a representation election by secret ballot to settle the question" and "certifies the winning union as the bargaining representative." *Id.* "The employer commits an unfair labor practice by refusing to bargain with the employees' certified bargaining representative." *Id.*

Unlike the outcomes of most elections held in the American political system, however, the NLRA "does not say how long a certificate of representation shall stand good."

[10] We recognize at the outset of this part of our argument that the Court has, on several occasions, noted in passing that the Board, under its *Celanese* rule, excuses employer refusals to bargain based on reasonably-based doubts concerning a union's continued majority status. *Brooks v. Labor Board*, 348 U.S. at 182; *FIEA*, 475 U.S. at 200, n.8; *Fall River Dyeing*, 482 U.S. at 41, n.8. But the question whether this self-help approach is basically incompatible with the overall structure of the Act as construed by this Court has never been directly at issue in this Court. Moreover, none of these recognitions of the Board's practice is phrased in a way demonstrating approval of *Celanese*. That being so, we believe that these asides do not have any binding force and that the issue we address is an open one.

NLRB v. Whittier Mills Co., 111 F.2d 474, 478 (5th Cir. 1940). It has long been understood, however, that a Board certification

> is not intended to be ephermeral, nor should it be perpetual. On general principle, *since it ascertains a status as existing, the presumption is that that status continues until it is shown to have ceased.* The employer is, in theory at least, not much concerned since the employees are to choose their representative unhindered. *So long as the employees make no contention that they are not correctly represented*, it would seem that the employer could safely continue to deal indefinitely with the designated bargaining agent. [111 F.2d at 478, emphasis added.]

Thus, while "[t]he Act recognizes that employee support for a certified bargaining representative may be eroded by changed circumstances" (*FIEA*, 475 U.S. at 198), the NLRA does not require that an incumbent union reestablish its majority support periodically, or whenever the employer chooses to question that majority.[11] Rather, as this Court also held in *FIEA*, the Act provides for an orderly procedure for revoking a previous bargaining authorization, and places the burden for invoking that procedure upon *those seeking the revocation*:

> In such cases, employees may petition the Board for another election, alleging that the certified

[11] The statute does *not* in terms require that the employer obligation to bargain collectively runs only to union representatives supported by a majority of the employees *at the time bargaining is sought*. A union that has prevailed in a certification election is a union that has been "designated or selected . . . by the majority of the employees" (NLRA § 9(a)), and is thus a union that fulfills the statutory requirement for serving as an exclusive bargaining representative. Section 9(a), in other words, states the manner in which representatives are to be *initially* "designated or selected," but does not state whether and in what manner a designation once made can, or must, be *rescinded*. Indeed, the statutory "designated or selected" language suggests that the controlling emphasis is not on later informally expressed employee sentiments, but on the most recent *formally* expressed views of a majority of the employees.

> representative no longer enjoys majority support. 29 U.S.C. § 159(c)(1)(A)(ii); 29 CFR § 101.17, 102.60(A) (1985). Similarly, an employer who questions whether a majority of employees continue to support a certified union may petition for another election. 29 U.S.C. § 159(c)(1)(B); 29 CFR § 101.17, 102.60(a) (1985); see C. Morris, The Developing Labor Law 349 (2d ed. 1983). The employer, however, must "demonstrate by objective considerations that it has some reasonable grounds for believing that the union has lost its majority status." *United States Gypsum Co.*, 157 NLRB 652, 656 (1966); 29 CFR 101.17 (1985); see *Morris, supra.* Again, if the Board determines, after investigation and hearing, that a question of representation exists, it directs election by secret ballot and certifies the result. 29 U.S.C. § 159(c). [*FIEA*, 475 U.S. at 198.]

And, as the *FIEA* Court also indicated, it is contrary to the statutory scheme to permit established bargaining relationships to be dismantled by informal means, such as by employer self-help:

> Under the Act, the certified union must be recognized as the exclusive representative of all employees in the bargaining unit, and the Board cannot discontinue that recognition without determining that the [situation is one which] raises a question of representation and if so, conducting an election to decide whether the certified union still is the choice of a majority of the unit. . . .
>
> * * * *
>
> *Any uncertainty on the employer's part does not relieve him of his obligation to bargain collectively.* "If an employer has doubts about his duty to continue bargaining, it is his responsibility to petition the Board for relief. . . ." [*FIEA*, 475 U.S. at 202, 209, *quoting Brooks v. Labor Board*, 348 U.S. at 103 (emphasis added).]

In sum, the Act provides that disputes concerning the continued majority status of *incumbent* unions are to be

resolved in a maner parallel to that now prevailing with respect to disputes concerning the majority status of a union seeking initial recognition. A Board-conducted election, and *not* less accurate proxies therefore, is necessary before the preestablished industrial order is to be disturbed. Under such a regime, the outcome turns entirely upon the expressed wishes of those directly affected, the employees, and not on the state of mind, actual or imputed, of the employer. That, of course, is exactly as it should be, where the inquiry concerns the *employees'* free choice and where the decision is made by majority rule. For reasons of maintaining the industrial status quo until a basis is shown for disturbing it, where there is an incumbent union the burden of invoking the Board election procedures must be on those who seek to *de*certify the previously chosen union representative, not on the union.

(b) There can be no doubt that the reasons for preferring a Board-conducted secret-ballot election over alternative means for determining employee sentiment in the initial certification context carry over with full force to the decertification context.

First, indirect expressions of employee desires—or inferences concerning those desires drawn from the actions of the employees and of the union—are necessarily equivocal and inexact in both settings. For example, the *Linden Lumber* Court noted that employees may engage in a recognition strike for reasons of social pressure, fear, or generalized sympathy for strikers, and not because of a desire to be represented by the particular union seeking recognition. By the same token, the refusal of employees to participate in an economic strike, or their determination to take jobs as striker replacements, may indicate economic need, a disagreement with the particular demands animating the strike, or a disagreement with the strike as the proper tactic in a particular labor dispute, and *not* a conviction that the employee group would be better off without its union representative.

As a more general matter, in this context, as in the initial recognition context, the concept of "union support" is inherently elusive. Obviously a strike is a critically important union initiative and employees who do not support a strike are, in one sense, not supporting the union. But the NLRA does not demand that in order to be represented by a union for purposes of collective bargaining, employees must promise to participate in all union initiatives and abide by all union policies, and then adhere to that promise. To the contrary, NLRA § 7 expressly protects the right of *represented* employees to decline to support the exclusive representative in any way other than financially.[12] And, §§ 8(a)(5) & 9(a) mandate that as long as a union has been "designated or selected for the purposes of collective bargaining by the majortiy of employees in a unit appropriate for such purposes", the employer is obliged to bargain with the union.

Thus, employees who work during a strike—or who do not become full union members, or who decline to provide a union with financial support (except when required to do so by a union security clause), or who complain about a particular union policy, or who oppose the present union leadership, or who disagree with a union's bargaining demands—may still decide, when the question is put to them directly, that, *on balance*, they continue to prefer union representation to the employer's unilateral control of their terms and conditions of employment.[13] If a ma-

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[12] Even as to financial support, employees incur such an obligation only where there is a valid union security clause negotiated between the union and the employer, and not otherwise. *See* NLRA § 8(a)(3).

[13] The electoral decisions of citizens are similar, as political pollsters well know: Individuals generally harbor a wide range of views about public issues, some of which coincide with those of a particular candidate and some of which do not. Also, the informa-

jority of employees in an appropriate unit makes that pragmatic choice, the employees are entitled to continued union representation (if the union is willing to represent them) despite a refusal to "support" the union in any of the ways just enumerated.

Even more direct indications of employee sentiment—such as the results of properly limited employer interviews (*see Struknes Constr. Co.*, 165 NLRB 1062 (1967)) and of employee petitions—suffer from defects similar to those of card checks in the initial recognition context. The precise circumstances surrounding the collection of employee views may be in dispute and foster litigation. And "[a] petition or public meeting—in which those voting for and against unionism are disclosed to management, and in which the influences of mass psychology are present—is not comparable to the privacy and independence of the voting booth." *Brooks v. Labor Board*, 348 U.S. at 99-100.

Further, the absence of a formal Board conducted election has the same effect on the employees' chance to consider both sides of the issue in the decertification context as it does in the certification context. Again, this case is illustrative: Individuals who choose to work as striker replacements may have little knowledge of the circumstances that gave rise to the strike in the first place, and will not, in all probability, be apprised of those circumstances by the employer.

There is, in addition, the consideration that this Court stressed in *Brooks v. Labor Board*, *supra*, a consideration

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tion that an individual has about a particular candidate will vary, both because more information becomes available through the campaign and because the candidate may, through his or her actions during the campaign, convince a voter that he or she should (or should not) be elected. As a result of the complexity of the decisionmaking process, until the actual date of the election, the opinions expressed to polltakers do not necessarily predict the outcome of the actual election.

that arises with even more force *because Linden Lumber*, *supra*, is now the law of the land: "Since an [initial certification] election is a solemn and costly occasion, conducted under safeguards to voluntary choice, *revocation of authority should occur by a procedure no less solemn than that of the initial designation.*" 348 U.S. at 99 (emphasis added).

To permit employers to insist upon a union-instigated certification election in order to establish a bargaining relationship, but then to allow employers to dissolve that duly-certified relationship without ascertaining, *with the same degree of formality*, that the majority support determined with due ceremony no longer obtains, is to turn the doctrinal blade of *Linden Lumber* inward. There is simply no principled justification for the proposition that the NLRA sees the destruction of an on-going bargaining relationship as a less weighty matter than the institution of that relationship. To the contrary, once a bargaining relationship is properly established, there is a statutory interest in the continuity of that relationship. *See Fall River Dyeing*, 482 U.S. at 38-39 (the presumption of continued majority support that arises once a union is certified, is based primarily on the "particular policy decision" that such a presumption furthers the Act's purposes by "permit[ting] unions to develop stable bargaining relationships with employers, which will enable the unions to pursue the goals of their members, and this pursuit, in turn, will further industrial peace"); *FIEA*, 475 U.S. at 208 ("[t]he Act includes several provisions designed to encourage stable bargaining relationships").

Second, the evidentiary difficulties in examining the employer's motives or state of knowledge in order to determine whether the employer has unlawfully refused to bargain are precisely the same in the initial recognition context and in the incumbent union context. The problem is exacerbated in the latter situation by the fact that the *Celanese* rule, even in its present, "objective"

version, still posits that in some cases, an employer's refusal to bargain with an incumbent union will be excused even though the union does *in fact* have majority support at the time of the refusal to bargain. *See Bartenders, Hotel, Motel and Restaurant Employers Association, supra.*

Nothing in the statute countenances such a result. As we have stressed, the Act, in terms, makes it an unfair labor practice to refuse to bargain with a properly selected § 9(a) union representative, even if the employer's refusal is the result of a good faith mistake as to employee sentiment. The opposite rule would "place in . . . careless employer . . . hands the power to completely frustrate employee realization of [a] premise of the Act—freedom of choice and majority rule in employee selection of representatives." *Bernhard-Altman*, 366 U.S. at 739.

Moreover, the Act is *not* premised on the proposition that employers should be encouraged to continually question the employees' commitment to their union representative. The employer is not entrusted with any such responsibility. Rather, the *employees* themselves, if they wish to decertify the union, have the right to file a petition toward that end with the Board. NLRA § 9(c)(1)(A)(ii). Where no such petition has been filed, the fair inference is that the employees remain satisfied with their union representative.

The notion that it is somehow unfair to hold that an employer who acts on a "reasonable belief" that the employee group does not support the incumbent union has committed an unfair labor practice does not hold water. Since 1947, the Act has permitted such an employer to file a decertification petition with the Board as long as the employer has "reasonable grounds for believing that labor organizations claiming to represent employees are really not the choice of the majority." S. Rep. No. 105, 80th Cong., 1st Sess., 10-11; 1 NLRB, Legislative History of the Labor Management Relations Act of 1947 (G.P.O.)

416. *See United States Gypsum Co.*, 157 NLRB 652, 656 (1966). And, as we have seen, under this Court's cases, that is the proper step for an employer to take if he or she has a sound basis for doubting majority union support.

The Board does require, it is true, that the employer demonstrate a reasonable objectively-based doubt of the incumbent union's majority in order to secure a decertification election. As a threshold showing for a Board election, however, requiring evidence of that kind makes perfect sense.[14] In that context, the determination that such a doubt exists does not serve to negate the statutory mandate to bargain with the properly designated union representative, but only serves as a precondition to a secret ballot expression of the actual desires of the employees. Additionally, under this approach, the employer may not simply rely on his or her own views about the evidence indicating a lack of union support and forthwith withdraw recognition from the union; rather, a reasonable

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[14] The requirements placed upon a union seeking to obtain a certification election in an initial recognition situation are similar in purpose and effect: A union cannot secure such an election simply by asking for one, or by merely *claiming* substantial employee support. Under the Board's regulations, the union must present evidence of 30% employee support. 29 C.F.R. § 101.18(a). That requirement serves to assure the Board and the affected employees and employer that there is indeed a real "question concerning representation," so that the election is not a useless expenditure of time and trouble. At the same time, by pegging the required showing to less than is necessary to prevail, the Board permits fair entry to the election processes, and allows the representation issue ultimately to be determined by those processes.

So here: the "reasonable doubt" standard in the decertification context, serves to assure the Board that there is indeed a serious "question concerning representation," while allowing access to the Board's processes on a showing less than that necessary in the end to alter the pre-existing bargaining relationship. In the decertification context, then, the reasonable doubt standard serves as an effective screening device, but in contrast to the *Celanese* approach, does not substitute a lesser standard for the statutory standard governing the obligation to bargain.

doubt as to continued union support triggers *a Board* determination of the adequacy of that evidence *before* the employer is permitted to act, not afterwards.[15]

Further, if an employer declines to take advantage of this means of ascertaining whether the union has lost majority support and erroneously bargains with a union that in fact does not enjoy such support, "no penalty attaches to the violation." *Bernhard-Altmann*, 366 U.S. at 740. Rather, if an employer "is found to have erred in extending [continued] . . . recognition, he is subject only to a remedial order requiring him to conform his conduct to the norms set out in the Act." *Id.*; *see also Fall River Dyeing*, 482 U.S. at 51, n. 18. Thus, the employer is not in any meaningful sense acting at his or her peril.

Third, and finally, requiring an employer to bargain with an incumbent union until that union is decertified in an election precipitated by the employees, or by the employer, sets a proper balance between the interest in the stability of established bargaining relationships and the interest in employee free choice as to representation. This approach places the burden on those seeking to disrupt an established relationship to justify the need to do so and if that is done gives full access to the Board representation election processes.

Indeed, as we have noted, in the incumbent union situation, the union enjoys what is termed a "presumption" of majority support premised upon a strong statutory policy favoring the continuity of bargaining relationships

[15] Neither the filing of a decertification petition nor the determination by the Board that the petition generates a question concerning representation indicates an actual loss of the incumbent union's majority support. Thus, under the Board's cases, neither justifies a refusal to bargain. *Dresser Industries*, 264 NLRB 1088 (1982); *Hydro Conduit Corp.*, 278 NLRB 1124 (1986), *enf't denied on other grounds, NLRB v. Hydro Conduit Corp.*, 813 F.2d 1002 (9th Cir. 1987).

once established. The *Fall River Dyeing* Court emphasized:

> The overriding policy of the NLRA is "industrial peace." *Brooks v. Labor Board*, 348 U.S. at 103 . . . The presumptions of majority support further this policy by "promot[ing] stability in collective-bargaining relationships, without impairing the free choice of employees". . . . In essence, they enable a union to concentrate on obtaining and fairly administering a collective-bargaining agreement without worrying that, unless it produces immediate results, it will lose majority support and will be decertified. See *Brooks v. Labor Board*, 348 U.S. at 100. . . . The presumptions also remove any temptation on the part of the employer to avoid good faith bargaining in the hope that, by delaying, it will undermine the union's support among the employees. [482 U.S. at 38.]

It follows *a fortiori* from this substantive policy that the burden is on those who believe that the union has lost its majority support to invoke the appropriate Board election processes for so determining.

Permitting employers to refuse to bargain with an incumbent union on the *belief* that the employees no longer desire union representation is, in contrast, a policy that leads to the instability of bargaining relationships. Since the Board's election processes are available where there is a basis to question a union's continuing support, the employer's failure to use those processes puts into question his or her true motive for engaging in self-help rather than seeking the election. There is, as a practical matter, a strong incentive for employers to claim a loss of majority support and then to refuse to bargain with a union, even where the employer is far from sure that the employees no longer desire union representation. As long as an employer can present loss of majority support as a colorable defense, the pendency of the legal proceedings alone, and the dormancy of the bargaining relationship in the meanwhile, tend to undermine the union's ability to serve the employees, and thereby finally

to destroy the bargaining relationship. This Court has several times recognized as much:

> Petitioner contends that whenever an employer is presented with evidence that his employees have deserted their certified union, he may forthwith refuse to bargain. In effect, he seeks to vindicate the rights of his employees to select their bargaining representative. . . . The underlying purpose of this statute is industrial peace. To allow employers to rely on employees' rights in refusing to bargain with the formally designated union is not conducive to that end, it is inimical to it. Congress has devised a formal mode for selection and rejection of bargaining agents . . . with due regard to administrative prudence.
>
> We find wanting the arguments against these controlling considerations. . . . [*Brooks v. Labor Board*, 348 U.S. at 103. *See also FIEA*, 475 U.S. at 209; *Fall River Dyeing*, 482 U.S. at 50, n.16.]

* * * *

In sum, the Board, and this Court, have determined that where there is a dispute over a union's majority support in the initial recognition situation, the Act's purposes are best fulfilled by a formal Board certification that the previously established regime for industrial governance no longer represents the desires of the employees. The reasons underlying that determination apply with considerably more force where there is an incumbent union and an established bargaining relationship and there is a dispute over the union's continued majority support. Consequently, this Court should disapprove the *Celanese* rule governing the latter situation.

Instead of permitting employers such as the one in this case to refuse to bargain on the basis of inferences and surmises about the desires of employees as to union representation, this Court should require the use of the formal Board representation-election process to ascertain the employees' true sentiments in this regard.

By refusing to bargain with the certified representative of its employees, without first filing a petition for a Board-conducted decertification election and awaiting the outcome, the employer in this case committed an unfair labor practice.

CONCLUSION

For the reasons stated above, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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BRIEF FOR MANVILLE CORPORATION AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether, in assessing the reasonableness of an employer's asserted doubt that an incumbent union enjoys continued majority support, the Board may refuse to apply any presumption regarding the extent of union support among replacements for striking employees.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR MANVILLE CORPORATION AS AMICUS CURIAE SUPPORTING RESPONDENT

CONSENT OF THE PARTIES

Petitioner and Respondent have consented to the filing of this brief and their letters of consent have been filed with the Clerk of the Court.

INTEREST OF MANVILLE CORPORATION

On July 22, 1988 Manville Corporation petitioned the Tenth Circuit for review, currently pending, of an NLRB decision and order (289 N.L.R.B. No. 40 (1988)), Docket No. 88-2134. The case presents similar issues, and related but not identical facts to those being considered by the Court here. Manville Corporation's interest is to describe the Board's application of its no-presumption rule in factual

contexts other than presented in the case under review in order to assist the Court to fully understand the Board's no-presumption rule as applied.

STATEMENT

On May 25, 1979 Local 968, General Drivers, Warehousemen and Helpers, representing Curtin Matheson's 27 warehouse employees, rejected Curtin Matheson's final contract offer. To force the Union's acquiescence, Curtin Matheson lawfully locked out its employees on June 4 for approximately one week. On June 12 it ended the lockout and renewed its May 25 offer. The Union again rejected it and called the 27 employees out on strike. Immediately five unit employees crossed the picket line to return to work. On June 17 Curtin Matheson implemented the wage increase in its final offer and on June 25 hired 29 permanent replacement employees. The Union continued striking until July 16 when it capitulated. It unconditionally ended the strike and accepted Curtin Matheson's May 25 offer. On July 19 it asked for immediate execution of a contract. On July 20 Curtin Matheson refused and withdrew recognition, saying it doubted the Union's continued majority support. Pet. App. 2a-4a.

The bargaining unit on July 20 consisted of 49 employees, 19 strikers (two had quit), 25 replacements (four had quit), and five crossovers.

Curtin Matheson's evidence supporting its claim of good faith doubt consisted of these credited facts:

1. Permanent replacements comprised a majority (25 of 49) of the bargaining unit. None of the employees indicated their support of the Union, the Union never contacted them, and they crossed the Union picket line every day to come to work.

2. Five additional employees (crossovers) rejected the strike and returned to work. Two of them, Tony Lopez and Bill Lee, who had never been Union members, told Director of Employee Relations Elizabeth Price that they did not support the Union.

3. On June 19 striker and Chief Shop Steward and negotiating committee member Shady Goodson told Ms. Price and Jim Crocker, another management official, that he was in an uncomfortable position because only the Union, not the employees, wanted the strike, and that other strikers felt the same way. He said he was having a tough time convincing strikers to maintain the picket line. Afterward he requested reinstatement, and later (on July 19) resigned.

4. On June 27 (two days after replacements were hired) striker and former shop steward J.R. Blackshire asked Ms. Price to be reinstated. He said he was angry at the Union and later, after speaking with other employees who were working, said that there was no Union anymore, that people were not supporting it, and that other striking employees wanted to return to work.

5. In early July striker Clint Waller crossed the picket line and told Ms. Price and Mr. Crocker that he had not been picketing because he was upset with the Union and intended to resign from membership. He later did so.

6. On July 12 striker Raymond Brunner crossed the picket line and told Price that he intended to retire because he did not want to have anything to do with the Union again.

7. On July 19 replacement David Schneider told Price he didn't think the Union represented the employees or was needed.

The administrative law judge found that Curtin Matheson possessed a reasonable basis for doubting the Union's majority. The Board rejected this ruling, holding that Curtin Matheson could not legitimately infer that the crossovers

repudiated the Union or that replacements did not support it. It held that Shady Goodson's statement could not be construed as a repudiation of the Union; and that the statements by other identified employees were individual expressions unreflective of other employees' views, and at most could support an inference that six employees opposed the Union. Pet. App. 25a-54a.

The Fifth Circuit granted Curtin Matheson's petition for review and denied enforcement of the Board's order. Pet. App. la-24a. It noted that over eighty percent of the bargaining unit was replaced on June 25, 1979, the replacements crossed a picket line each day to come to work, and the Union never sought to contact them. At least one replacement told the company that the Union did not represent the employees and was not needed. In view of this "context", it found the employer was justified in counting the striker replacements as doubtful supporters of the Union. The Court also observed that Chief Shop Steward and negotiating committee member Goodson's statement that the (striking) employees did not want the strike could be relied on as significant evidence of striking employees' lack of support for the Union.

SUMMARY OF ARGUMENT

The Board was correct in *Buckley Broadcasting Corp., Local 51 (Station KKHI)*, 284 N.L.R.B. No. 113 (1987), application for enforcement pending, No. 88-7106 (9th Cir. filed Mar. 7, 1988) to repudiate its irrational presumption that striker replacements support the striking Union in the same ratio as strikers themselves and to announce that hence forth it would assess the Union sentiments of striker replacements without application of presumptions. But even in the absence of a presumption an employer may properly infer in most circumstances that replacement employees do not

favor representation by the striking Union. This inference is supported by experience and common sense, has been recognized by Congress and the courts, and was allowed by the Board in many cases before *Buckley Broadcasting* in which an employer's claimed reasonable, good faith doubt of the Union's majority status was assessed.

However, since *Buckley Broadcasting* the Board refuses to recognize the validity of this inference. It assumes that each striker replacement harbors no sentiment either for or against the Union unless and until the replacement's "actual[] oppos[ition]" to the Union (Pet. Br. 20) is established by the employer through evidence of expressed opposition. Circumstantial evidence of non-support is ignored. The Board in practice applies its so-called no-presumption rule as a presumption (of non-opposition to the Union), imposing upon the employer the same burden of proving replacements' actual opposition as it imposed under its repudiated presumption that replacements support the striking Union. The Fifth Circuit was correct to consider the rules as operationally equivalent.

The Board's assumption that striker replacements possess no sentiments disfavoring union representation is irrational. Moreover, the so-called no-presumption rule emasculates the long established and uniformly accepted good faith doubt rule. First, by definition the good faith doubt rule requires only proof of "doubt", not proof of a union's actual minority status. Yet, the Board applies its no-presumption rule by effectively requiring proof of the union's actual minority status before it recognizes the existence of good faith "doubt." This burden of proof is impermissible under the good faith doubt rule, Fed. R. Evid. 301, and the Board's statutory obligation to prove unfair labor practices by a preponderance of the evidence. Second, the good faith doubt rule, by its very nature, entails evaluation of the totality of direct and circumstantial evidence probative

of the union's loss of majority support. *Celanese Corporation of America*, 95 N.L.R.B. 664, 673 (1951). Yet, the no-presumption rule, because it requires direct evidence of employee expressions of union opposition, discounts circumstantial evidence of non-support, preventing a fair evaluation of probative circumstantial evidence supporting an employer's good faith doubt.

The Board failed to explain or to justify its departure from the good faith doubt rule, which for almost forty years has instructed the Board's and courts' assessment of the lawfulness of an employer's withdrawal of recognition from a perceived minority union. The Court thus owes the Board's decision no deference. Moreover, the policy reasons the Board cites do not support its step. The Board cites no empirical basis, and there is none, justifying a conclusion that the traditional good faith doubt rule upsets bargaining stability by encouraging employers to unseat unions through the hiring of striker replacements. In fact, employers generally choose replacement of employees as a last resort. The Board's argument that application of the good faith doubt rule impinges on employees' right to strike is overstated. Properly understood, establishing good faith doubt simply shifts the burden of producing evidence of the Union's majority back to the Board and Union, which are in a better position than the employer to prove it. The Board's policy arguments also ignore the statutory prohibition against an employer bargaining with a minority union.

The Fifth Circuit correctly rejected the Board's no-presumption policy. The lower court's analysis, consistent with the good faith doubt rule, fairly assessed the record facts and, unlike the Board, allowed valid inferences from the evidence. Its holding that Curtin Matheson possessed good faith doubt of the incumbent Union was undoubtedly correct. But even if the Court disagrees with the lower court's factual findings, it should remand to the Board for reassessment under the correct legal standard, permitting natural inferences to be drawn from the facts, requiring a showing short of proof of the Union's actual minority, and fairly evaluating the cumulative effect of all facts and circumstances on the issue of the Union's continuing majority.

ARGUMENT

THE BOARD'S APPLICATION OF ITS SO-CALLED NO-PRESUMPTION RULE IS IRRATIONAL AND EMASCULATES THE GOOD FAITH DOUBT RULE BY IMPOSING AN IMPROPER BURDEN OF PROOF AND BY UNFAIRLY EVALUATING CIRCUMSTANTIAL EVIDENCE OF UNION NON-SUPPORT.

A. An Employer May Nearly Always Infer That Striker Replacements Disfavor Representation By The Striking Union.

The Board in *Buckley Broadcasting Corp., Local 51 (Station KKHI)*, 284 N.L.R.B. No. 113 (1987), application for enforcement pending, No. 88-7106 (9th Cir. filed Mar. 7, 1988) correctly repudiated a presumption approach to assessment of the union sentiments of striker replacements. It is empirically irrational to mandate an assumption that striker replacements support the striking union irrespective of surrounding facts. Since, as the Board notes, it is at least conceivable that a replacement may desire representation by the striking union, a presumption of opposition is also improper.

But an inference may be proper even where a presumption is eschewed. Inferences and presumptions are conceptually distinct: "[i]n the case of an inference, the existence of B *may be deduced* from A by the ordinary rules of reasoning and logic; in the case of a presumption, the existence of B *must initially be assumed* because of a rule of law." (foot-

notes omitted, emphasis in original) 1 Weinstein & Berger, *Weinstein's Evidence* ¶ 300[01] n.3, (1980), quoting Morgan, *Basic Problems of Evidence* 32 (1962). Determination of an employer's reasonable, good faith doubt essentially is an inferential process, as the Board noted in *Celanese Corporation of America*, 95 N.L.R.B. at 673 almost forty years ago:

> By its very nature, the issue of whether an employer has questioned a union's majority in good faith cannot be resolved by resort to any simple formula. It can only be answered in the light of the totality of all the circumstances involved in a particular case.

See also NLRB v. Tahoe Nugget, Inc., 584 F.2d 293, 305 (9th Cir. 1985) ("In gauging union support, the employer is often without direct evidence of minority status, and therefore he may properly rely on reasonable inferences from the available information.") Indeed, all judicial proof is essentially inductive, involving permissible inferences from proven facts. lA Wigmore, Evidence §§ 30, 37.4 pp. 984-986, 1033 (Tillers rev. 1983).

An inference that striker replacements disfavor representation by the striking union is almost always permissible and often compelling. The striking union virtually always will try to advance strikers' interests at the expense of replacement "scabs", and replacements are typically aware of this. *Buckley Broadcasting*, 284 N.L.R.B. No. 113 slip op. at 16. It commonly will try to force the employer to expel replacement workers in a strike settlement to recapture strikers' jobs. *See, e.g., Belknap, Inc. v. Hale*, 463 U.S. 491 (983) (union ousted replacements in strike settlement); *Trans World Airlines v. Independent Federation of Flight Attendants*, ___ U.S.___, 109 S.Ct. 1225, 1233 (1989) ("employer and union in many circumstances may reach a back-to-work agreement that would displace crossovers and new hires..."); *NLRB v.*

Randle-Eastern Ambulance Service, Inc., 584 F.2d 720, 724 (5th Cir. 1978) (union demanded that replacements be terminated); *Johns Manville Sales Corporation*, 289 N.L.R.B. No. 40 (1988), petition for review pending, No. 88-2134 (l0th Cir. filed July 22, 1988), slip op. at 12 (same). After the strike is over, assuming replacements have not been displaced, the union will continue to oppose replacements' interests. Each of the post-strike issues as to which Petitioner asserts (Pet. Br. 26 n.17) a union could play an instrumental role in resolving would be won by the union directly at the expense of replacement employees.

It therefore is widely recognized that striker replacements in all probability oppose representation by the striking union. *See Whisper Soft Mills, Inc. v. NLRB*, 754 F.2d 1381, 1388 (9th Cir. 1984) (union demand to reinstate all strikers as condition of strike settlement justified assumption that replacements opposed union representation); *Bickerstaff Clay Products Company, Inc. v. NLRB*, 871 F.2d 980, 992 (llth Cir. 1989) ("Common sense dictates that it is highly unlikely that a replacement worker supports the union if the union is negotiating for his discharge and he crosses a union-sponsored picket line, violent or not, to report to work each day."); Weiler, *Striking a New Balance: Freedom of Contract and the Prospects for Union Representation*, 98 Harv. L. Rev. 351, 390 (1984) ("The employees hired as permanent replacements, on the other hand, are likely to be hostile to the union, if only because the union will insist that they be dismissed in favor of the strikers as a condition to any settlement."); Flynn, J., *The Economic Strike Bar: Looking Beyond The "Union Sentiments" of Permanent Replacements*, 61 Temple Law Review 691, 705 (1988) ("Knowing that the union may well be negotiating for their ouster, replacements are likely to oppose the union out of the simple desire to hold on to their positions."). A recent reviewer observed:

> [T]he connection between the strikers' replacements and the conclusion that they do not support the union is so strong that a presumption is not necessary. Instead, all that is required is the same type of permissible inference that is characteristic of all circumstantial evidence. Therefore, the existence of permanent strikers' replacements is consistent with the characteristics of objective evidence necessary to prove a good faith doubt. Indeed, the use of strikers' replacements as objective evidence is supported by the Board's consistent use of similar inferential assumptions to rebut the continuing majority support presumption. Among these are the admission of lack of majority status by the bargaining representatives; a decline in the number of union dues check off authorizations; lack of incumbent union activity; oral statements of employees, particularly when numerous and reliable; written repudiations of the union by the employees; the history of employer-union relations; and, the employees' filing of decertification petitions. Although these grounds have not always been held to be sufficient proof of loss of majority support, either by themselves or cumulatively, the Board has consistently allowed them to be considered in determining the reasonableness of an employer's doubt.

Note, *The Strikers' Replacements Presumption And An Employer's Duty to Bargain With The Incumbent Union*, 21 Boston College Law Review, 455, 472-473 (1980).

Congress also recognized the validity of an inference that replacements oppose the striking union. At least in part the recognition led it in 1959 to amend section 9(c)(3) of the Labor Management Relations Act, 1947, 29 U.S.C. § 159(c)(3), to permit replaced strikers to vote in a representation election held within twelve months of the commencement of the strike. Congress recognized that replacement workers would inevitably vote out the striking union in an election in which only they voted. *See* remarks of Senate Sponsor John Kennedy describing then existing law at 105 Cong. Rec. S5746 (daily ed. April 21, 1959) ("...if a representational election is held the union loses, because it is not likely that the replacement workers will vote for the union.").

Available empirical studies also support the validity of an inference that replacements as a whole disfavor union representation. It is well recognized that norms influence an employee's support or opposition to a union. *See* B. Ruth Montgomery, *The Influence of Attitudes and Normative Pressures on Voting Decisions in a Union Certification Election*, 42 Industrial and Labor Relations Review, 262, 263 (1989), and studies cited therein. The empirical basis for the Board's assumption that *new* employees support the incumbent union is derived from the observation that new employees hired into an organized plant generally accept the status quo. However, where all union employees are replaced in a fell swoop, the union norm no longer exists. Not only is the old norm abolished, a new norm polarized against the striking union is established, supporting the inference that the workforce as a whole disfavors representation by the striking union. The Fifth Circuit recognized this in the case under review, observing that:

> [o]ver eighty percent of the bargaining unit work force (twenty-two of twenty-seven employees) was replaced on June 25, 1979. Where such a substantial percentage of the bargaining unit employees is replaced on the same day, and the striker replacements cross a picket line, violent or not, to report to work each day, the Company is justified in counting the striker replacements as employees whom they doubt support the Union.

859 F.2d at 367. Available empirical knowledge of probable replacement employee union sentiments solidly supports the court's observation, not as a presumption, but as a permissible evidentiary inference.

The Board itself refrained from applying presumptions in assessing Union sentiments of striker replacements prior to adopting its ill-fated presumption approach in *Cutten Supermarket*, 220 N.L.R.B. 507, 509 (1975), and *Windham Community Memorial Hospital*, 230 N.L.R.B. 1070 (1977), *enforced*, 577 F.2d 805 (2d Cir. 1978). *Buckley Broadcasting*, 284 N.L.R.B. No. 113, slip op ... 8. Rather, it accepted inferences of replacements' union nonsupport when warranted by the evidence. *See S & M Manufacturing Co.*, 172 N.L.R.B. 1008, 1008-09 (1968) ("As the only employees then working were ... newly hired employees who had crossed the picket line to go to work and who are not shown to have manifested their support of the Union, it cannot be found that there were any Union adherents among the employees working..."); *Arkay Packaging Corporation*, 227 N.L.R.B. 397, 397-398 (1976) ("no evidence demonstrating Union support of replacements"); *Stoner Rubber Company, Inc.*, 123 N.L.R.B 1440, 1444 (1959) (not "unreasonable [for employer] to assume that none of [its] permanent replacements were union adherents"); *Jackson Mfg. Co.*, 129 N.L.R.B. 460, 478 (1960) ("most improbable" that replacements "had chosen the Union to represent [them]"); *Titan Metal Mfg. Co.*, 135 N.L.R.B. 196, 215 (1962) ("no evidence that any of the replacements had authorized the Union to represent them."); *Peoples Gas System, Inc.*, 214 N.L.R.B. 944, 947 (1974), *reversed and remanded on other grounds sub nom. Teamsters Local Union 769 v. NLRB*, 532 F.2d 1385, 1391 (D.C.Cir. 1976) ("While it is of course possible that the replacements, who had chosen not to engage in the strike activity, might nevertheless have favored union representation, it was not unreasonable for Respondent to infer

that the degree of union support among those employees who had chosen to ignore a Union-sponsored picket line might well be somewhat weaker than the support offered by those who had vigorously engaged in concerted activity on behalf of Union-sponsored objectives.").

Professor Gorman, whose "presumption" gave rise to this case, did not advocate application of a technical presumption when he reported the Board's practice.[1] Nor was Gorman's text so viewed by the courts. The first court to quote the language, *NLRB v. Randle-Eastern Ambulance Service, Inc.*, 584 F.2d at 729, actually held that:

> the Company *made permissible inferences from solid evidence* - the number of returning strikers, the Union resignations, *the number of replacements*, and the Union representative's remark - which in our view were sufficient to support a reasonable doubt of the Union's continued majority status ... The Board's determination otherwise rested on presumptions we consider inapplicable, [and] on the *rejection of inferences we consider permissible* ....

584 F.2d at 729 (emphasis added). *See also, Bickerstaff Clay Products Company, Inc. v. NLRB*, 871 F.2d at 991 ("While the court [in *NLRB v. Randle-Eastern Ambulance Service, Inc.*,] did approvingly cite to Professor Gorman's treatise, its decision to include permanent replacements as objective evidence of loss of union support was based on the fact that the Union was bargaining for the discharge of the striker replacements to make room for the strikers. The existence

[1] "[I]f a new hire agrees to serve as a replacement for a striker, in union parlance, a strike breaker, (or worse), it is generally assumed that he does not support the Union and that he ought not to be counted toward a Union majority. When such strikebreakers or permanent replacements constitute a majority of the unit, the presumption of union majority is undermined. *Titan Metal Mfg. Co.*, 135 N.L.R.B. 196 (1962). R. Gorman, *Labor Law* 112 (1976).

of picket line violence with respect to striker replacements was also a factor which strengthened the Company's doubt that those employees support the Union."). Even the Fifth Circuit in *Curtin Matheson*, while adverting to the "Gorman presumption", 859 F.2d at 367, specifically held that "the Company was justified in doubting that the striker replacements supported the Union *in this context.*" *Ibid* (emphasis added). The court's decision thus reveals its recognition that the employer's doubt of the Union's majority status arose from a factually permissible inference, not from the mandate of a presumption.

The Board's valid argument that a *presumption* of replacements' opposition to the union is improper because it is conceivable that a replacement might desire representation by the striking union does not similarly illegitimize an *inference* that replacements likely do not favor the striking Union. Legal factfinding is routinely confronted with alternative hypotheses afforded by the facts, and the relevant question is which among possible hypotheses possesses the requisite degree of probability. 1A Wigmore, *Evidence* § 31 n.2 (Tillers rev. 1983). Thus, the bare possibility that a replacement might desire representation by the striking Union is not argument for disallowing an inference of replacements' probable non-support where the facts fairly permit it.

Still, the inference of union non-support being a factual one, it follows that facts showing actual Union support must weaken or even extinguish it. *Cf. S & M Manufacturing Co.*, 172 N.L.R.B. at 1008-09 (Board noted that no evidence was presented tending to show replacements' Union support); *Arkay Packaging Corporation*, 227 N.L.R.B. at 397-398 (same). Conversely, evidence that replacements are subjected to violent attack by strikers or that the union actively campaigns against their interests at the bargaining table or elsewhere, logically strengthens the inference of non-support. *Randle-Eastern Ambulance Service, Inc.*, 584 F.2d at 724; *Bickerstaff Clay Products Company, Inc.*, 871 F.2d at 991. Whether the inference of non-support drawn from the hiring of replacements, together with inferences derived from other direct and circumstantial evidence, are sufficient to satisfy the employer's burden of proving reasonable good faith doubt depends on a weighing of the totality of the facts and circumstances against the applicable burden of proof. *Celanese Corporation of America*, 95 N.L.R.B. 664, 673 (1951). But until the Board adopted its presumption that replacements support the striking Union, the employer at least had been permitted to point to the hiring of replacements as evidence supporting its claimed good faith doubt. Despite its announced discontinued reliance on presumptions in *Buckley Broadcasting*, however, the Board continues to deny the relevance of such evidence.

B. The Board Applies Its So-Called No-Presumption Rule As A Presumption Of Replacements' Non-Opposition To The Union, Disallowing Any Inference Of Replacements' Non-Support Absent Proof Of Their Actual Opposition To Representation By The Union.

Under the guise of its so-called no-presumption rule the Board since *Buckley Broadcasting* assumes that no replacements harbor sentiments against representation by the Union. It permits an inference of a replacement's Union non-support only if the employer proves the replacement's actual opposition to the Union by direct evidence. Pet. Br. 20 ("[o]nly by demonstrating that the replacements are actually opposed to the union may an employer carry his burden of proving a good-faith doubt of majority status."). The Board's position is apparent from *Curtin Matheson* where it held (Pet. App. 33a):

> [i]n this case, the apparently peaceful picket line the replacements crossed and the Union's apparent failure to contact them during the strike do not provide a basis for inferring their union sentiments, as these matters are 'common to the hiring of replacements.' [citing *Buckley Broadcasting*].

Further, the Board insists on evidence of a replacement's *expressed* opposition to the Union as a condition of allowing an inference of that employee's Union non-support. *See Johns-Manville Sales Corporation*, 289 N.L.R.B. No. 40, slip op. at 9 (Board "will review each case on its facts considering whether the employer has proffered evidence of employees' *expressed* desires to repudiate the union sufficient to overcome the overall presumption of continuing union majority." (emphasis supplied)). The Board in practice does not recognize circumstantial evidence of union non-support. Only in cases where the employer has proved that a majority of the bargaining unit either signed a decertification petition or otherwise unequivocally stated opposition to union representation has the Board permitted it to withdraw recognition.[2] In all other cases it has rejected as insufficient the employer's proffered evidence of good faith doubt, of whatever quantum or nature.[3] Thus, while the Board in

[2] *Airport Aviation Service, Inc.*, 292 N.L.R.B. No. 87 (1989); *Atwood & Morrill Co.*, 289 N.L.R.B. No. 100 (1988); *Bil-Mar Foods, Inc.*, 286 N.L.R.B. No. 84 (1987); and *Paper Board Cores, Inc.*, 292 N.L.R.B. No. 107 (1989).

[3] *Accurate Die Casting Co.*, 292 N.L.R.B. No. 106 (1989); *Bickerstaff Clay Products Co.*, 286 N.L.R.B. No. 27 (1987), *enforcement denied*, 871 F.2d 980 (llth Cir. 1989); *Bolton-Emerson, Inc.*, 293 N.L.R.B. No. 139 (1989); *Christopher Street Owners Corp.*, 286 N.L.R.B. No. 22 (1987); *Colonna's Shipyard, Inc.*, 293 N.L.R.B. No. 15 (1989); *Cook Bros. Enterprises, Inc.*, 288 N.L.R.B. No. 46 (1988); *Destileria Serralles, Inc.*, 289 N.L.R.B. No. 10 (1988), *enforced*, 1989 U.S.App.Lexis 12221 (lst Cir. 1989); *Dold Foods, Inc.*, 289 N.L.R.B. No. 156 (1988); *Glover Bottled Gas Corp.*, 292 N.L.R.B. No. 99 (1989); *Hajoca Corp.*, 291 N.L.R.B. No. 16 (1988), *enforced*, 872 F.2d 1169 (3d Cir. 1989); *Johns-Manville Sales Corp.*, 289 N.L.R.B. No. 40 (1988), petition for review pending, No. 88-2134 (10th Cir. filed July 22, 1988); *KEZI, Inc.*, 286 N.L.R.B. No. 135 (1987); *Pennex Aluminum Corp.*, 288 N.L.R.B. No. 53 (1988), *enforced without op.*, 869 F.2d 590 (3d Cir. 1989); *Pilgrim Industries, Inc.*, 286 N.L.R.B. No. 21 (1987); *Powell Electrical Manufacturing Co.*, 287 N.L.R.B. No. 100 (1987); *Proxy Communications*, 290 N.L.R.B. No. 68 (1988), *enforced*, 873 F.2d 552 (2d Cir 1989); *Robinson Bus Service, Inc.*, 292 N.L.R.B. No. 20 (1988); *Sterling Processing Corp.*, 291 N.L.R.B. No. 30 (1988); *Tile, Terrazzo & Marble Contractors Assoc.*, 287 N.L.R.B. No. 79 (1987); *Tube Craft, Inc.*, 289 N.L.R.B. No. 122 (1988); *United Supermarkets, Inc.*, 287 N.L.R.B. No. 11 (1987); *Valley Kitchens, Inc.*, 287 N.L.R.B. No. 69 (1987); *W.A.D. Rentals, Ltd.*, 289 N.L.R.B. No. 9 (1988); *Wallkill Valley General Hospital*, 288 N.L.R.B. No. 18 (1988), *enforced*, 866 F.2d 632 (8th Cir. 1989); *Wells Fargo Armored Service Corp.*, 290 N.L.R.B. No. 101 (1988); *Wells Fargo Armored Service Corp.*, 290 N.L.R.B. No. 106 (1988); *Wells Fargo Armored Service Corp.*, 290 N.L.R.B. No. 110 (1988).

Curtin Matheson implied that evidence of picket line violence or direct negotiations by the union to oust replacements as a condition of a strike settlement might have altered its finding (Pet. App. 3a n.l), it did not make a difference in the Board's decision when the record contained such evidence. *Johns Manville Sales Corporation*, 289 N.L.R.B. No. 40, *Bickerstaff Clay Products Co.*, 286 N.L.R.B. No. 27 (1987), *enforcement denied*, 871 F.2d 980 (llth Cir. 1989); *Dold Foods, Inc.*, 289 N.L.R.B. No. 156 (1988). Moreover, if expressions of union opposition fall short of being made by a majority of the bargaining unit, good faith doubt will not be found, regardless of the amount of additional circumstantial evidence. *Johns-Manville Sales Corporation*, 289 N.L.R.B. No. 40 (evidence of pervasive strike violence and bargaining table demands to oust the replacements held insufficient since "more reliable factors, including the list for the decertification petition and the statements from identified employees" could have indicated, but did not indicate, "more tangibly majority employee dissatisfaction with the Union...") *Id.* , slip op. at 11-12.

The post-*Buckley Broadcasting* cases reveal that the Board has applied its so-called no-presumption rule in practice as a presumption of every replacement's non-opposition to the union.[4] The condition to be satisfied to overcome the presumption is proof of each replacement's expressed or articulated opposition to the Union. The burden of proof imposed on the employer by the no-presumption rule is identical to the burden imposed by the Board's repudiated presumption that replacements support the striking union: proof of each replacement's actual opposition to the Union. *See Pennco*, 250 N.L.R.B. 716, 718 (1980), *enforced* 684 F.2d 340 (6th Cir. 1982), *cert. denied*, 459 U.S. 994 (1982) (employer must produce evidence that replacements "who crossed the picket line, in fact, did not support the union.") The Fifth Circuit was correct to observe no operational difference between the Board's presumption of replacements' union support and its effective presumption of their non-opposition to the Union under the guise of its no-presumption rule.

C. The Board's Assumption That No Replacement Employee Opposes Representation By The Union Is Irrational.

Board inferences and presumptions are enforceable only if there exists "rationality between what is proved and what is inferred." *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 804-805 (1945); *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 493 (1978); *NLRB v. Baptist Hospital, Inc.*, 442 U.S. 773, 787 (1979) ("It is, of course, settled law that a presumption adopted and applied by the Board must rest on a sound factual connection between the proved and inferred facts.")

[4] A presumption, properly understood, is "a procedural rule which requires the existence of fact B (presumed fact) to be assumed when fact A (basic fact) is established unless and until a certain specified condition is fulfilled." 1 Weinstein & Berger, *Weinstein's Evidence* ¶ 300[01] n.3, (1980), quoting Morgan, *Basic Problems of Evidence* 32 (1962).

"Where such a nexus is lacking, the presumption is invalid." *United Scenic Artists, Local 829, v. NLRB*, 762 F.2d 1027, 1034 (D.C. Cir. 1985). Policy alone is not an adequate basis for an agency's presumptions. *Id.*

The Board's no-presumption policy is irrational in this case because it assumes the existence of a fact of which there is no evidence. *See, Holland Livestock Ranch v. United States,* 543 F.Supp. 158 (D.Nev. 1982), *aff'd*, 714 F.2d 90 (9th Cir. 1983) (Irrational to presume trespass of livestock on public land in absence of any evidence that such trespass has in fact occurred). Specifically, the Board assumes that no striker replacements oppose representation by the striking union, yet it can cite no evidence of its assumed fact; indeed, all record evidence suggests the contrary. The mere possibility that a replacement might cross a picket line and still support the striking union, the Board's only asserted empirical ground for its policy (Pet. Br. 17), is insufficient because a mere possibility cannot raise itself by its bootstraps to the level of fact, and this record contains no hint that *any* replacements actually desired representation by the Union. Consequently, the Board may not charge the employer with disproving a presumed fact of which there is no credible direct or circumstantial evidence in the first place. *United Scenic Artists, Local 829 v. NLRB*, 762 F.2d at 1035 n.26.

D. The Board's No-Presumption Rule Departs From the Good Faith Doubt Rule Without Explanation Or Justification.

1. The No-Presumption Rule Requires Proof Of The Union's Actual Minority Status Thus Eliminating The "Doubt" Prong Of The Good Faith Doubt Rule.

The good faith doubt rule[5] requires a lesser showing than actual proof of the incumbent union's minority status in

[5] All courts of appeals have endorsed the two part good faith doubt rule. *See Soule Glass And Glazing Co. v. NLRB*, 652 F.2d 1055, 1109 (lst

order to rebut the overall presumption of the union's continuing majority. *Celanese Corporation of America*, 95 N.C.R.B. at 673. As the Board explained over thirty years ago in *Stoner Rubber Company, Inc.*:

> An employer can hardly prove that a union no longer represents a majority since he does not have access to the union's membership lists and direct interrogation of employees would probably be unlawful as well as of dubious validity. Accordingly, to overcome the presumption of majority the employer need only produce sufficient evidence to cast serious doubt on the union's continued majority status. The presumption then loses its force and the General Counsel must come forward with *evidence* that on the refusal-to-bargain date the union in fact did represent a majority of employees in the appropriate unit.

123 N.L.R.B. at 1445.

Cir. 1981); *NLRB v. Massachusetts Machine And Stamping, Inc.*, 578 F.2d 15, 18 (lst Cir. 1978); *NLRB v. Windham Community Memorial Hospital*, 577 F.2d 805, 811 (2d Cir. 1978); *NLRB v. Alvin J. Bart & Co., Inc.*, 598 F.2d 1267, 1271 (2d Cir. 1979); *NLRB v. Wallkill Valley General Hospital*, 866 F.2d 632,636 (3d Cir. 1989); *Terrell Machine Co. v. NLRB*, 427 F.2d 1088, (4th Cir. 1970), *cert. denied*, 398 U.S. 929 (1970); *NLRB v. Gulfmont Hotel*, 362 F.2d 588 (5th Cir. 1966); *Automated Business Systems v. NLRB*, 497 F.2d 262, 270 (6th Cir. 1974); *Orion Corporation v. NLRB*, 515 F.2d 81, 85 (7th Cir. 1975); *Star Manufacturing Company v. NLRB*, 536 F.2d 1192, 1195 (7th Cir. 1976); *National Car Rental System, Inc.*, 594 F.2d 1203, 1205 (8th Cir. 1979); *National Cash Register Company v. NLRB*, 494 F.2d 189, 194 (8th Cir. 1974); *Whisper Soft Mills, Inc. v. NLRB*, 754 F.2d at 1387 (9th Cir. 1984); *NLRB v. Roger's IGA, Inc.*, 605 F.2d 1164, 1166 (lOth Cir. 1979); *Bickerstaff Clay Products Co., Inc. v. NLRB*, 871 F.2d at 985; *Peoples Gas System, Inc. v. NLRB*, 629 F.2d 35, 44 (D.C. Cir. 1980). The Board continues to apply it, and the Supreme Court has cited it approvingly in *Brooks v. NLRB*, 348 U.S. 96, 101 (1954); *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272, 279 n.3 (1972); *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 41 n.8 (1987).

This principle is well established in Board and court decisions. *Laystrom Manufacturing Co.*, 151 N.L.R.B. 1482, 1483; *Sofco, Inc.*, 268 N.L.R.B. No. 15; *J & J Drainage Products Co.*, 269 N.L.R.B. 1163, 1171 (1984); *Automated Business Systems v. NLRB*, 497 F.2d 271 (6th Cir. 1974); *Peoples Gas System, Inc. v. NLRB*, 629 F.2d 35, 44 (D.C. Cir. 1980); *Randle-Eastern Ambulance Service*, 584 F.2d at 728; *Bickerstaff Clay Products Co., Inc.*, 871 F.2d at 985.

Yet the Board's no-presumption rule, by requiring proof of each replacement's anti-union expressions before an inference of the replacement's union non-support is permitted, effectively conditions satisfaction of the good faith doubt standard on establishing the union's actual minority status. The no-presumption rule, as applied by the Board, effectively eliminates the good faith doubt prong of the *Celanese* test.

2. The No-Presumption Rule Imposes An Unwarranted Burden Of Proof On The Employer.

The Board's no-presumption rule fails to comport with Fed. R. Evid. 301, and with the Board's statutory obligation to establish the existence of an unfair labor practice by a preponderance of the evidence.

Fed. R. Evid. 301 provides that a presumption:

> imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

Additionally, overcoming a presumption does not require production of "clear and convincing" evidence. *Price Waterhouse v. Hopkins*, ___U.S.___, 109 S. Ct. 1775, 1792 (1989). *See also, Bolton-Emerson, Inc.*, 293 N.L.R.B. No. 139 (1989), slip op. at 2 n.2 (Board's decisions do not require proof of

good faith doubt by "clear, cogent and convincing" evidence). Thus, as is usual in a civil case, the Board retains the ultimate burden of establishing "that the existence of the proposition to be proved is more probably true than not true." *Keeler Brass Company v. Continental Brass Company*, 862 F.2d 1063, 1066 (4th Cir. 1988); 29 U.S.C. § 160 (b) (Board proceedings "shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States..."). The Board is required to comply with the mandate of Fed. R. Evid. 301. *Presbyterian/St. Luke's Medical Center v. NLRB*, 653 F.2d 450, 456 (10th Cir. 1981).

The Board's application of its no-presumption rule oversteps its proof obligation under Fed.R. Evid. 301 because it effectively transfers to the employer the burden of persuasion on the issue of the union's majority status. It does so because the Board recognizes no quantum of direct and circumstantial evidence of the union's minority status to satisfy the employer's burden of proof save proof of the union's actual minority status. Otherwise stated, the employer has not met its burden of proof until the union's minority status is conclusively established. The Board also violates Fed.R. Evid. 301 by recognizing only evidence of union-opposing *expressions*. Essentially, the Board accepts only direct evidence as probative of union non-support, eschewing circumstantial evidence thereof as unreliable. By limiting proof to direct evidence of employee expressions the Board effectively has adopted a "clear and convincing" evidence standard prohibited by Fed. R. Evid. 301 and the Board's own precedents. *See McCormick on Evidence* § 340 (3d Ed. 1984) ("clear and convincing" standard requires persuasion that truth of contention is "highly probable").

The Board's statutory obligation to prove unfair labor practices likewise prohibits a shift to the employer of the burden of proving the Union's actual minority status. The

National Labor Relations Act, 29 U.S.C. §§151 *et. seq.*, requires the Board to bear the burden of establishing an unfair labor practice. "Section 10(c) of the Act, 29 U.S.C. § 160(c), expressly directs that violations may be adjudicated only 'upon the preponderance of the testimony' taken by the Board. The Board's rules also state that '[t]he Board's attorney has the burden of pro[ving] violations of Section 8.' 29 CFR § 101.10(b) (1982)." *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 401 (1983).

The Board can properly shift to the employer the burden of persuasion as to issues constituting an affirmative defense to a proven unfair labor practice. *See NLRB v. Transportation Management Corp.*, 462 U.S. at 401 (employer properly bears burden of persuasion of affirmative defense that employee would have been discharged regardless of unlawful motive where Board has already proved elements of unfair labor practice). However, an employer's burden to overcome the overall presumption of the Union's majority status is not akin to an affirmative defense. Section 8 (a)(5) of the Act in terms prohibits an employer's refusal to bargain with a *majority* representative of its employees. *Maphis Chapman Corp. v. NLRB*, 368 F.2d 298, 303 (4th Cir. 1966) (failure to prove majority status relieves employer of any duty to bargain). Proof of majority is thus an element of the Board's affirmative case. *NLRB v. Dayton Motels, Inc.*, 474 F.2d 328, 331 (6th Cir. 1973). While initially the Board may rely on a rebuttable presumption of the Union's continuing majority status to satisfy that element of its affirmative case, if the presumption is rebutted, the burden of proving actual majority shifts back to the Board, *Automated Business Systems v. NLRB*, 497 F.2d at 270 (6th Cir. 1974), and failure to prove majority defeats the Board's affirmative case. Since the employer's evidence of good faith doubt serves to defeat an element of the Board's case in chief, it is not in the nature of an affirmative defense. *See In*

re Rawson Food Service, Inc., 846 F.2d 1343, 1349 (llth Cir. 1988) ("A defense which points out a defect in the plaintiff's prima facie case is not an affirmative defense); *Keeler Brass Company*, 862 F.2d at 1066. Consequently, the Board may not lawfully shift to the employer the ultimate burden of persuasion on the issue of the Union's non-majority, as it seeks to do. Section 10(c) of the Act requires the burden of persuasion at all times to remain with the Board.

3. The Board's No-Presumption Rule Precludes A Fair Evaluation Of The Cumulative Effect Of Circumstantial Evidence Bearing On The Issue Of The Union's Continuing Majority Status.

The good faith doubt rule requires that the facts and circumstances indicative of the union's loss of majority be considered cumulatively. *Dalewood Rehabilitation Hospital, Inc., d/b/a Golden State Habilitation Convalescent Center v. NLRB*, 566 F.2d 77, 80 (9th Cir. 1977); *Royal Typewriter Co. v. NLRB*, 533 F.2d 1030, 1036 (8th Cir. 1976). In other words, even where a particular factor considered alone would be insufficient to support a good faith doubt of a union's majority status, the cumulative force of all of the factors may be adequate to support such a doubt. *Bellwood General Hospital, Inc. v. NLRB*, 627 F.2d 98, 104 (7th Cir. 1980); *National Cash Register Company v. NLRB*, 494 F.2d at 194; *NLRB v. Tahoe Nugget, Inc.*, 584 F.2d at 305. This rule is but an application of the traditional evidentiary principle that a piece of evidence may not be enough by itself to prove a desired fact, but may be enough when considered along with all other relevant facts. *See McCormick on Evidence* 542-543 (3d Ed. 1984):

> An item of evidence, being but a single chain of proof, need not prove conclusively the proposition for which it is offered .... It is enough if the item could reasonably show that a fact is slightly more probable than it would appear without that evidence .... Thus, the common objection that the inference for which the fact is offered "does not necessarily follow" is untenable. It poses a standard of conclusiveness that very few single items of circumstantial evidence ever could meet. A brick is not a wall.

See also Advisory Committee's Note to Fed. R. Evid. 401 ("...[I]t is not to be supposed that every witness can make a home run." *quoting* Falknor, *Extrinsic Policies Affecting Admissibility*, 10 Rutgers L. Rev. 574, 576 (1956), which itself quoted Professor McBaine.)

However, the Board's no-presumption rule precludes it from fairly evaluating circumstantial evidence of union non-support. The Court in *Bickerstaff Clay Products, Inc.*, noted this clearly:

> In determining whether an employer has sufficient objective evidence of loss of union support to justify withdrawal from bargaining, the cumulative effect of all of the evidence must be considered. [*Thomas Industries, Inc. v. NLRB*, 687 F.2d 863, 868 (6th Cir. 1982)] Generally, several indicia of loss of majority support are required and no one factor is determinative, i.e., striker replacements or union dormancy. *Soule Glass*, 652 F.2d at 110. We acknowledge that the above factors do not translate readily into a "precise numerical estimate" of the Union's strength, but this is not fatal to the Company's case. *Randle-Eastern*, 584 F.2d at 729. We emphasize that the Company need not have conclusive proof that the majority of employees do not support the Union, only sufficient "objective evidence to support a good faith doubt of majority

status." *Id.* In our view, the Board *has erroneously looked at each piece of evidence in isolation, instead of looking at the totality of factors presented by the Company*. The Ninth Circuit, in reversing a Board order finding insufficient evidence in a good faith doubt case, has this criticism of the Board which is applicable to this case:

> The Board concluded that each fact considered separately did not give [the Company] reasonable grounds to doubt the union's majority status and that the evidence as a whole was no greater than the sum of its separate parts.... The courts require an assessment of the cumulative force of the combination of factors [citations omitted]. Even when each factor considered alone is insufficient for a good faith doubt of majority status, the combination may be adequate.
>
> *Golden State Rehabilitation Convalescent Center v. National Labor Relations Board*, 566 F.2d 77, 79-80 (9th Cir. 1977).

(emphasis added) 871 F.2d at 994. The Board's unfair evaluation of circumstantial evidence stems from its practical requirement, embodied in its no-presumption, that nothing save proof of the union's actual minority status will overcome the effective presumption of replacements' non-opposition to the Union. As the court in *Bickerstaff* recognized, the result is the Board's seriatim inspection of each piece of circumstantial evidence evincing Union non-support and its discarding of the evidence if insufficient by itself to prove "actual opposition." It does not consider whether the evidence in its totality establishes good faith doubt. This approach violates McCormick's "a brick is not a wall" observation, denying the efficacy of each piece of evidence for its failure in effect to "hit a home run." 1A Wigmore, *Evidence*

§§ 32 n.1 (Tillers rev. 1983). *See e.g. Johns-Manville Sales Corporation*, 289 N.L.R.B. No. 40. It also denies to employers inferences the Board itself routinely draws. *See NLRB v. Clement Brothers Company*, 407 F.2d 1027, 1029 (6th Cir. 1969) (Board allowed to infer that majority of bargaining unit had been unlawfully coerced by Union despite direct evidence showing only numerical minority suffered actual coercion); *Department Store Food Corp. of Pennsylvania v. NLRB*, 415 F.2d 74, 77 n.4 (3d Cir. 1969) ("appropriate for Board to consider numerical evidence as supportive of other permissible inferences"). The Board is required by statute fairly to weigh all direct and circumstantial evidence in the record as a whole. *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474, 488 (1951). Its failure to permit any inference of Union non-support from evidence of replacements' hiring and other circumstantial evidence of non-support violates this obligation, precluding the Court from finding that the Board's decision is supported by "substantial evidence on the record considered as a whole." Act, §10(e), 29 U.S.C. § 160(e); *NLRB v. Baptist Hospital, Inc.*, 442 U.S. 773, 791.

4. The Board's Decision Is Not Entitled To Deference Because The Board Neither Explained Nor Justified Its Departure From Long Standing Precedent.

It is a fundamental principle of administrative law that an agency may not significantly depart from its own prior precedents without explicitly recognizing that it is doing so and explaining why. *Shaw's Supermarkets v. NLRB*, 884 F.2d 34 (lst Cir. 1989); *NLRB v. International Union of Operating Engineers, Local 925*, 460 F.2d 589 (5th Cir. 1972). As the Court in *Atcheson, Topeka & Santa Fe Railway Co. v. Wichita Board of Trade*, 412 U.S. 800, 808-09 (1973) cautioned, an agency has a:

> duty to explain its departure from prior norms. *Secretary of Agriculture v. United States* [347 U.S. 645, 653-54 (1954)] ... Whatever the ground for departure from prior norms, however, it must be clearly set forth so that the reviewing court may understand the basis of the agency's action and so may judge the consistency of that action with the agency's mandate ..."

Absent such explanation, the agency's action is not entitled to deference. *Local 777, Democratic Union Organizing Committee v. NLRB*, 603 F.2d 862, 871-72 (D.C. Cir. 1978).

The Board's practice since *Buckley Broadcasting* effectively jettisons its long standing "doubt" standard, accepted by all circuits and at least implicitly by the Court, in favor of a higher standard requiring proof of the Union's actual minority status. It behooves the Board to explain and to justify its departure from the good faith doubt rule, but the Board has not done so. It hasn't even officially acknowledged the effect of its no-presumption rule on the "doubt" component of the good faith doubt rule. Moreover, its policy arguments are directed against adoption of a presumption of replacements' Union opposition; they do not address why rejection of the good faith doubt rule as traditionally applied, a middle ground between two "presumption" extremes, is justified. For example, while the Board argues that a presumption of opposition would encourage employers to refrain from bargaining in good faith since they would know they could wipe out the Union by hiring replacements, it has not offered any argument or empirical evidence showing that the good faith doubt rule encouraged such conduct by employers. In fact, the Board cited no empirical evidence that replacement of employees occurs more commonly today than before.

The Board's argument that application of a presumption of replacements' union opposition would impinge on employees' right to strike is overstated when read against a traditional application of the good faith doubt rule. Properly understood, establishing good faith doubt simply rebuts the presumption of majority, shifting the burden of production of evidence of the union's majority back to the Board and union. *Automated Business Systems v. NLRB*, 497 F.2d at 270. It is not unfair to impose an evidentiary burden on the Board and union. They have more accurate intelligence of union supporters than the employer, *Stoner Rubber*, 123 N.L.R.B. at 1444, who cannot poll employees, or even ask for a Board election, without first marshalling evidence of union non-support sufficient to allow it to withdraw recognition. *Hajoca Corporation v. NLRB*, 872 F.2d 1169, 1176 (3d Cir. 1989) (Board requires "substantial, objective evidence" to justify poll); *United States Gypsum*, 157 N.L.R.B. 652 (1966) (employer must show objective considerations in seeking election).

The Board also neglected to analyze whether its no-presumption rule is as consistent as the traditional good faith doubt rule with an employer's prohibition on bargaining with a minority union. *International Ladies' Garment Workers' Union v. NLRB*, 366 U.S. 731, 738 (1961). In fact, its position, unlike the good faith doubt rule, will likely lead to entrenchment of minority unions. But the Board has no authority or discretion to adopt a rule that will result in that which the Labor Act prohibits. Since the Board has failed to explain or justify its departure from the good faith doubt rule, as traditionally applied, and the consequences its departure fairly entails, its decision cannot be accorded deference.

E. The Fifth Circuit Correctly Assessed The Totality Of Facts And Circumstances Showing The

Employer's Reasonable Good Faith Doubt Of The Union's Majority.

The Fifth Circuit correctly rejected the Board's no-presumption policy. The lower court, consistent with the good faith doubt rule, fairly assessed the record facts and, unlike the Board, permitted reasonable inferences from the evidence of the Union's loss of support. That evidence was countered with *no* evidence tending to show that replacements in fact supported Union representation. Under the circumstances, the lower court's holding that the employer possessed good faith doubt of the incumbent union's majority status was undoubtedly correct. But even if the Court disagrees with the lower court's factual findings, it should remand to the Board for a fair assessment under the good faith doubt standard, permitting natural inferences to be drawn from the facts, requiring a showing short of proof of the union's actual minority, and evaluating the cumulative effect of the totality of facts and circumstances bearing on the issue of the Union's continuing majority.

CONCLUSION

The judgment of the court of appeals should be affirmed, or in the alternative, remanded to the Board for a fair evaluation of the facts and circumstances.

Respectfully submitted.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

CURTIN MATHESON SCIENTIFIC, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* SUPPORTING RESPONDENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 88-1685

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

CURTIN MATHESON SCIENTIFIC, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* SUPPORTING RESPONDENT

This brief *amicus curiae* of the Chamber of Commerce of the United States of America (the "Chamber") is filed with the consent of the parties, as provided for in Rule 36.2 of the Rules of this Court.

STATEMENT OF INTEREST

The Chamber is the largest association of business and professional organizations in the United States. Its membership consists of approximately 180,000 companies and

several thousand other organizations such as state and local chambers of commerce and trade and professional organizations.

The Chamber regularly represents the interests of its member employers in important labor relations matters vitally affecting those interests before this Court, the lower courts, the United States Congress, the Executive Branch and the National Labor Relations Board. Such representation constitutes a significant aspect of the Chamber's activities. Accordingly, the Chamber has sought to advance those interests by filing briefs in a wide spectrum of labor relations litigation.[1]

The instant case presents an issue of vital concern to the Chamber and its member employers—*i.e.*, whether employers must presume that permanent strike replacements desire union representation even though those permanent replacements align themselves against any striking union's most important self-help initiative by crossing a picket line, thereby incuring the union's enmity, and often becoming targets of union retribution and violence.[2] The issue has an impact on any of the numerous Chamber members which must resolve whether a union represents a majority of employees during and after a strike when strikers have been replaced with lawfully hired permanent replacements. The filing of this brief will enable the Court to consider the perspective of employers which experience first-hand the inherent conflict between striking unions and striker replacements

[1] *E.g., Trans World Airlines, Inc. v. Independent Federation of Flight Attendants*, 109 S.Ct. 1225 (1989); *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539 (1988); *Pattern Makers League v. NLRB*, 473 U.S. 95 (1985).

[2] As discussed in Part I.A., the Board has mischaracterized the issue in this case by claiming to apply no presumption at all. (*See* Pet. Br. I, 5). In fact, the Board presumes that permanent replacements do want union representation.

—a conflict that renders absurd the Board's presumption that permanent replacements desire exclusive representation by a striking union.

SUMMARY OF ARGUMENT

For twenty-five years the Board maintained a rule that comported with common sense: the Board presumed that permanent striker replacements vote with their feet against representation by a striking union when they align themselves against that union by crossing its picket line. Inexplicably, the Board has more recently taken the opposite approach—first, by openly applying a presumption that striker replacements do want union representation, and then, by purporting to apply a no-presumption rule but, in fact, continuing to presume union support. The former approach was unanimously rejected by the federal courts of appeals. The latter approach was rejected by the court below and should be rejected by this Court.

Any presumption that permanent striker replacements are likely to want the striking union representing them cannot withstand review. First, the Board's presumption is simply not rational as it fails to take account of the inherent conflict of interests between permanent striker replacements and striking unions—a conflict which the Board itself has recognized—and the resulting probability that those permanent replacements would not desire to entrust their exclusive representation to the striking union. Second, the Board's approach is also irrational in that it exacerbates the existing disparity in the parties' access to relevant evidence by placing upon the employer the entire burden of proving loss of majority even though the employer is the only party hamstrung by Board restrictions on polling and other non-coercive means of ascertaining the representational wishes of replacements. Finally, the Board's approach fails to comport with the National Labor Relations Act ("NLRA") itself since

it forces replacements to give up their fundamental Section 7 right to refrain from being represented by the striking union and instead, locks in replacements to preserve the striking union's representational status.

The Board's approach is entitled to no deference, not only because it is so contrary to reality, but also because the Board never addressed conflicts with its own prior precedent. Moreover, the Board's rationale is premised upon the type of balancing of economic weapons this Court has repeatedly forbidden the Board from performing. But even if the Board's ultimate conclusion was correct that "no overriding generalization" (Pet. App. 76a) is possible about the representational preferences of replacements, that would mean that as a matter of law, there is a question concerning representation when a unit majority consists of permanent striker replacements. Section 9 of the NLRA mandates that the Board resolve questions concerning representation by conducting elections. In contrast, the Board has most often refused to conduct elections and, instead, the Board's General Counsel has sought to resolve such questions concerning representation through unfair labor practice proceedings. Thus, even if this Court does agree with the Board's ultimate conclusion that it is difficult to generalize concerning the representational desires of replacements, it should not permit the Board to ignore the statutorily mandated means for ascertaining those desires.

ARGUMENT

I. THE ONLY RATIONAL PRESUMPTION TO BE DRAWN FROM STRIKER REPLACEMENTS ALIGNING THEMSELVES AGAINST A STRIKING UNION BY CROSSING ITS PICKET LINE AND PERMANENTLY REPLACING STRIKERS IS THAT THE REPLACEMENTS DO NOT DESIRE UNION REPRESENTATION.

A. The Board's New "No-Presumption Rule" is No Different from its Previous Presumption, Unanimously Rejected by the Courts of Appeals, that Striker Replacements Want Union Representation.

Employers may lawfully hire permanent replacements for economic strikers in an effort to continue operations and thereby defeat a strike.[3] It is also well-settled that an employer may withdraw recognition from a union if, based on objective considerations, it has a good faith doubt that the majority of employees desire union representation.[4] The issue in this case is whether an employer may presume that lawfully hired permanent replacements, who are strangers to representation by the striking union and who align themselves with the em-

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[3] *See Trans World Airlines*, 109 S.Ct. at 1230; *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 345-46 (1938).

[4] *See Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 41 n.8 (1987); *NLRB v. Financial Institution Employees of America*, 475 U.S. 192, 198 (1986); *Brooks v. NLRB*, 348 U.S. 96, 182 (1954); *Whisper Soft Mills, Inc. v. NLRB*, 754 F.2d 1381, 1387 (9th Cir. 1984); *Retired Persons Pharmacy v. NLRB*, 519 F.2d 486, 489 (2d Cir. 1985); *Celanese Corp. of America*, 95 N.L.R.B. 664 (1951).

For one year after the commencement of an economic strike, the relevant employee complement includes economic strikers, permanent replacements, non-strikers and "cross-overs" (strikers who elect to abandon a strike and return to work). After this one year pericd, economic strikers are ineligible to vote in a Board election and thus are no longer considered to be within the relevant employee bargaining unit. *See* 29 U.S.C. § 159(c)(3).

ployer in seeking to defeat the union's strike and, indeed, to permanently replace the strikers, do not desire representation by the striking union.[5]

For at least a quarter century, the Board assumed or presumed that striker replacements do *not* desire union representation.[6] The federal courts of appeal affirmed this common sense approach.[7] One of the nation's leading

[5] Where, as here, permanent replacements are strangers to a striking union and to representation by that union, the usual Board rule that an incumbent union's majority support is presumed to continue has no relevance. In fact, where, as here, permanent replacements have never had any opportunity to vote on union representation, the only presumption that makes sense is that they do not desire representation.

[6] *See Arkay Packaging Corp.*, 227 N.L.R.B. 397, 397-98 (1976), *aff'd*, 575 F.2d 1045 (2d Cir. 1978); *Beacon Upholstery Co.*, 226 N.L.R.B. 1360, 1367-68 (1966) (employer "had a reasonably based doubt that the Union continued to represent a majority" where 10 of 13 members of unit were replacements); *Peoples Gas Systems, Inc.*, 214 N.L.R.B. 944, 947 (1974) (union's interests were "diametrically opposed to those of the strike replacements"), *rev'd on other grounds sub nom. Teamsters Local Union 769 v. NLRB*, 532 F.2d 1385, 1391 (D.C. Cir. 1976); *S&M Mfg. Co.*, 172 N.L.R.B. 1008, 1008-09 (1968); *Titan Metal Mfg. Co.*, 135 N.L.R.B. 196, 215 (1962) (employer "justified in refusing to bargain with the Union" as "[t]here was no evidence that any of the replacements had authorized the Union to represent them"); *Jackson Mfg. Co.*, 129 N.L.R.B. 460, 478 (1960) (it is "most improbable" that "the replacements hired during the strike had chosen the Union to represent [them]"); *Stoner Rubber Co.*, 123 N.L.R.B. 1440, 1444 (1959) (not "unreasonable to assume that none of [the employer's] permanent replacements were union adherents"); *Celanese*, 35 N.L.R.B. at 674 (fact that majority of unit was made up of replacements was "sufficient, in our opinion, to have given rise to a reasonable doubt that Union continued to represent a majority of the employees in the unit").

[7] *NLRB v. Alva Allen Indus., Inc.*, 369 F.2d 310, 316 (9th Cir. 1966); *Philip Carey Mfg. Co. v. NLRB*, 331 F.2d 720, 734 (6th Cir.) ("In light of the large number of strikers who were permanently replaced, there would be substantial grounds of doubt concerning the union's majority status."), *cert. denied*, 379 U.S. 388 (1964).

labor law treatises also subscribed to this view long held by the Board, thereby giving rise to its description today as the "Gorman presumption." *See* R. Gorman, *Labor Law* 112 (1976) ("[I]f a new hire agrees to serve as a replacement for a striker . . . it is generally assumed that he does not support the union and that he ought not be counted toward a union majority.")

Beginning in 1977, however, the Board abandoned the historical presumption with which Professor Gorman concurred and adopted the opposite approach: presuming that striker replacements wanted representation by a striking union.[8] No particular evidence, logic or problem was cited by the Board as a basis for its 180-degree shift. Every Court of Appeals to consider the Board's new presumption of adherence to the union rejected it out of hand.[9] As the Eighth Circuit concluded, a presumption that a new employee who acts so as to defeat its effort to shut down an employer nonetheless wants union representation is "ridiculous" and "far from reality." *National Car Rental System v. NLRB*, 594 F.2d at 1206.

Faced with this overwhelming vote of no confidence, the Board announced that it would reconsider its erroneous approach in *Buckley Broadcasting Corp. (Station KKHI)*, 284 N.L.R.B. No. 113 (July 27, 1987), *applic.*

[8] *See Windham Community Memorial Hosp.*, 230 N.L.R.B. 1070 (1977), *enf'd on other grounds*, 577 F.2d 805 (2d Cir. 1978).

[9] *See Whisper Soft Mills, Inc. v. NLRB*, 754 F.2d 1381, 1388 (9th Cir. 1984); *NLRB v. Pennco, Inc.*, 684 F.2d 340, 342 (6th Cir.), *cert. denied*, 459 U.S. 994 (1982); *Soule Glass & Glazing Co. v. NLRB*, 652 F.2d 1055, 1111 (1st Cir. 1981) (striker replacements are "not presumed to support the union whose picket line they have been crossing"); *National Car Rental System, Inc. v. NLRB*, 594 F.2d 1203, 1206 (8th Cir. 1979); *NLRB v. Randle-Eastern Ambulance Service*, 584 F.2d 720, 728 (5th Cir. 1978) (" 'generally assumed' " replacements do " 'not support the Union' " (citation omitted)); *NLRB v. Windham Community Mem. Hospital*, 577 F.2d 805, 813 (2d Cir. 1978).

for enforcement pending, No. 88-7106 (9th Cir. 1988). But while purporting to do away with its discredited presumption that permanent striker replacements want union representation in that decision, the Board reached effectively the very same conclusion and merely dressed it up in superficially different garb.

Under the *Buckley/KKHI* standard applied by the Board in this case, as under the Board's discredited presumption of union support, the Board automatically concludes, absent proof by an employer to the contrary, that permanent striker replacements nonetheless want representation by the striking union. The only difference is that now that conclusion rests on a presumption not limited to striker replacements alone. *See* Pet. App. 9a ("Under either standard, the Company is required to have objective evidence regarding the striker replacements' non-support [for the Union] in order to count them as employees whom the Company doubts support the Union.")

The lack of difference between the Board's *Buckley/KKHI* standard and its discredited presumption of union support is readily apparent from the Board decisions applying *Buckley/KKHI*. Six times the Board has applied *Buckley/KKHI* in reviewing decisions by administrative law judges that had ruled against an employer on the basis of the old presumption of union support; in none of these cases did the Board reach a different result under its supposedly new and different standard.[10] In fact, despite the Board's claim to weigh such questions on a flexible, case-by-case basis, in the twelve decisions

[10] *See Accurate Die Casting Co.*, 292 N.L.R.B. No. 106 (Feb. 10, 1989); *Tube Craft, Inc.*, 289 N.L.R.B. No. 122 (July 14, 1988); *Cook Bros. Enterprises*, 288 N.L.R.B. No. 46 (April 8, 1988); *Tile, Terrazo & Marble Contractors Ass'n*, 287 N.L.R.B. No. 79 (Dec. 16, 1987); *Valley Kitchens, Inc.*, 287 N.L.R.B. No. 69 (Dec. 16, 1987); *Bickerstaff Clay Products*, 286 N.L.R.B. No. 27 (Sept. 30, 1987), *enforcement denied*, 871 F.2d 980 (11th Cir. 1989).

since *Buckley/KKHI* the Board has *never* found that an employer has produced sufficient evidence of union nonsupport among replacements to rebut the Board's new presumption of majority status.[11] And the Board has reached that conclusion even in the face of: the hanging of an effigy of a replacement;[12] evidence of 47 incidents of damage to replacements' cars, threats and verbal abuse;[13] and a Board finding that union officers committed an unfair labor practice by threatening replacements with violence in an effort to prevent their crossing a picket line.[14]

The Board's brief would have this Court believe that it applies a "no-presumption rule" in determining whether permanent striker replacements desire union representation. (Pet. Br. I, 5). In fact, as the Fifth Circuit correctly concluded, that characterization fundamentally misstates the approach adopted by the Board below. Indeed, the Board itself has candidly admitted previously that what it now seeks to defend as a "no-presumption rule" is, in fact, an application of an "overall presumption of continuing majority status." *See Tile, Terrazo & Marble Contractors Ass'n*, 287 N.L.R.B. No. 79, at 2 n.2 (Dec.

[11] *See* cases cited in note 10, *supra*; *Glover Bottled Gas Corp.*, 292 N.L.R.B. No. 99 (Feb. 8, 1989); *Hajoca Corp.*, 291 N.L.R.B. No. 16 (Sept. 30, 1988), *enforced*, 872 F.2d 1169 (3d Cir. 1989); *Proxy Communications of Manhattan, Inc.*, 290 N.L.R.B. No. 68 (July 29, 1988), *enforced*, 873 F.2d 552 (2d Cir. 1989); *Dold Foods, Inc.*, 289 N.L.R.B. No. 156 (July 28, 1988); *Johns-Manville Sales Corp.*, 289 N.L.R.B. No. 40 (June 27, 1988); *Curtin Matheson Scientific, Inc.*, 287 N.L.R.B. No. 35 (Dec. 16, 1987), *enforcement denied*, 859 F.2d 362 (5th Cir. 1988), *cert. granted*, 109 S.Ct. 3212 (1989). Similarly, a review of published charge dispositions by the NLRB General Counsel reveals not a single Section 8(a)(5) charge dismissed on the basis of evidence of replacement nonsupport for a striking union found to be sufficient to overcome the *Buckley/KKHI* standard.

[12] *See Johns-Manville Sales Corp., supra.*

[13] *See Dold Foods, supra.*

[14] *See Proxy Communications, supra.*

16, 1987). Thus, a more accurate description of the Board's current approach to permanent replacements is to say that its non-presumption is, in fact, a presumption. As the Fifth Circuit properly concluded, the Board's non-presumption presumption "has the same effect" as its prior presumption that striker replacements support the striking union. (Pet. App. 9a).[15] And, as shown below, the Board's adoption of a new label for its discredited presumption of union support cannot change the fact that any such approach is both irrational and contrary to the NLRA.

B. The Presumption that Replacements Do Not Desire Representation is Rational and Consistent with the Act; The Board's Non-Presumption Presumption is Neither.

"[C]ourts have the duty to review the Board's presumptions 'both for consistency with the Act, and for rationality.'" *NLRB v. Baptist Hospital, Inc.*, 442 U.S. 773, 787 (1979) (quoting *Beth Israel Hospital, Inc. v. NLRB*, 437 U.S. 483, 501 (1978)). For example, in *Baptist Hospital*, this Court barred the application of a presumption that union solicitation of hospital employees did not disturb patient care where the solicitation occurred in corridors and sitting rooms used by patients. *Id.* at 787-89. Similarly, the lower federal courts have applied this principle to set aside other erroneous presumptions adopted by the Board.[16] Application of that

[15] Indeed, the Board virtually concedes this in the last paragraph of its brief. *See* Pet. Br. at 28 n.18 ("To be sure, under the no-presumption rule the employer must still overcome the general rebuttable presumption that the union enjoys majority support").

[16] *See, e.g., Royal Coach Lines, Inc. v. NLRB*, 838 F.2d 47, 50 (2d Cir. 1988) (irrational to presume union's continuing majority status where union had obtained recognition through unlawful means); *United Scenic Artists, Local 829 v. NLRB*, 762 F.2d 1027, 1034 (D.C. Cir. 1985) (presumption set aside because of absence of "rational nexus between the proven facts and the presumed facts").

principle to the case at bar requires that the Board's non-presumption presumption be set-aside in favor of the non-representational presumption applied by the Board for a quarter century.

1. *Only the Non-Representational Presumption Comports with Probability and the Reality of the Inherent Conflict Between Striker Replacements and Striking Unions.*

"The most important consideration" in testing the rationality of a presumption is "probability"—*i.e.*, the likelihood that "proof of fact B renders the existence of fact A so probable that it is sensible and timesaving to assume the truth of fact A until the adversary disproves it." E. Cleary, *McCormick on Evidence* § 343 at 969 (1984 & supp. 1987); *accord* 9 Wigmore, *Evidence* § 2491 at 304 (Chadbourn rev.).

Only the presumption that striker replacements do not desire union representation satisfies this test; the Board's non-presumption presumption reaches an absurd result that cannot be reconciled with the real world conflict between striking unions and lawfully hired permanent striker replacements. Indeed, the Board itself has conceded the implausibility of believing that striker replacements desire union representation in another current line of cases that it never even addressed in formulating the *Buckley/KKHI* standard.

The Board has repeatedly held that there is an "inherent conflict" of interests between striker replacements and a striking union.[17] The Board has recognized that a

[17] *See, e.g., Service Electric Co.*, 281 N.L.R.B. No. 633 (1986). Because of this conflict, the Board has concluded that employers have no obligation to bargain with a striking union "concerning the continued employment terms of [striker] replacements." *Id.*; *see also Schmidt-Tiago Constr. Co.*, 286 N.L.R.B. No. 31 (Sept. 30, 1987); *Marbro Co.*, 284 N.L.R.B. No. 129, at 2 (July 24, 1987); *Leveld Wholesale, Inc.*, 218 N.L.R.B. 1344 (1975). Federal courts have reached the same conclusion. *See Woodward Sand Co. v.*

striking union cannot bargain simultaneously in the best interests of both strikers and their replacements. *Service Electric*, *supra* at 14. If a striking union strives to assert the replacements' interests, it "undermines its own strike objective by allowing the struck employees to continue operations with replacements working under terms formulated as a result of its own negotiations." *Id.* at 14. The only effective way to advance the union's strike objective is to demand that any striker replacements be fired or, at a minimum, bargain for conditions that impede their employment. Significantly, the Board has recognized that striker replacements are themselves aware of this conflict: "Strike replacements can reasonably foresee that if the union is successful, the strikers will return to work and the strike replacements will be out of a job." *Leveld Wholesale, Inc.*, 218 N.L.R.B. at 1350.

Because of the "inherent conflict" between striker replacements and striking unions, the Board has concluded that it is "not logical to expect [a striking union] 'to negotiate in the best interests of strike replacements.'" *Service Electric*, 281 N.L.R.B. at 13-14 (quoting *Leveld Wholesale*, 218 N.L.R.B. at 1350). That same finding compels rejection of the Board's non-presumption presumption in favor of the non-representational presumption referred to by Professor Gorman. If, as the Board has found, it is improbable (or, as the Board has said "not logical" to believe) that a striking union would fairly represent striker replacements, then it is at least as improbable that striker replacements would desire such representation.

As employers, the members of the Chamber of Commerce have first-hand knowledge of the implausibility of the *Buckley/KKHI* presumption. The Chamber's members' experience confirms that striking unions regard striker replacements as "traitors" for undercutting any

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Western Conference of Teamsters Pension Trust Fund, 789 F.2d 691, 696 (9th Cir. 1986); *Capitol-Husting Co. v. NLRB*, 671 F.2d 237, 246 (7th Cir. 1982).

strike's objective—shutting down the employer by keeping all employees out—and for permanently replacing strikers. In union parlance, unions regard replacements as "scabs"—a term this Court has recognized to be an "insult or epithet." [18]

The hostility of striking unions toward replacements is evidenced in any number of ways. The Board's decisions and other accounts of strikes are filled with cases of

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[18] *See Old Dominion Branch No. 496 v. Austin*, 418 U.S. 264, 283 (1974). The antipathy evidenced in striking unions' view of replacements as "scabs" is best illustrated by a "well-known piece of trade union literature" found by this Court to have been "published countless times in union publications" which purports to supply a definition of that term that has been attributed to Jack London:

> The Scab
>
> After God had finished the rattlesnake, the toad and the vampire, he had some awful substance left with which he made a scab.
>
> A scab is a two-legged animal with a cork-screw soul, a water brain, a combination backbone of jelly and glue. Where others have hearts, he carries a tumor of rotten principles.
>
> When a scab comes down the street, men turn their backs and Angels weep in Heaven, and the Devil shuts the gates of Hell to keep them out.
>
> No man (or woman) has a right to scab so long as there is a pool of water to drown his carcass in, or a rope long enough to hang his body with. Judas was a gentleman compared with a scab. For betraying his Master, he had character enough to hang himself. A scab has not.
>
> Esau sold his birthright for a mess of pottage. Judas sold his Savior for thirty pieces of silver. Benedict Arnold sold his country for a promise of a commission in the British Army. The scab sells his birthright, country, his wife, his children and his fellowmen for an unfulfilled promise from his employer.
>
> Esau was a traitor to himself; Judas was a traitor to his God; Benedict Arnold was a traitor to his country; a SCAB is a traitor to his God, his country, his family and his class.

Id. at 268 (citation and emphasis omitted).

unions subjecting replacements to threats of violence.[19] All too often, union picketers violently attack or even shoot at replacements.[20] Often replacements find their homes firebombed or vandalized or find their car tires slashed or windshields smashed.[21] Striking unions fre-

[19] *See, e.g., Bickerstaff Clay*, 871 F.2d at 986; *United Tel. Answering & Communications Serv. Union, Local 780*, 276 N.L.R.B. 507, 510 (1985) (member of union's executive board engaged in "illegal coercion" by twice threatening to "kick [a replacement's] 'ass' and her 'mother's ass' " if she crossed the picket line); *NLRB v. Union Nacional de Trabajadores*, 611 F.2d 926, 931 (1st Cir. 1961) (replacements threatened with "large broken pieces of wooden two-by-fours in a raised position"); *Teledyne Indus., Inc.*, 295 N.L.R.B. No. 25, at 6-7 (June 15, 1989) (picketers threatened replacements with sledge hammers and wrenches); *I T Services*, 263 N.L.R.B. 1183, 1187-88 (1982) (union picketers threatened to kill replacements and their family members); *District 34, Int'l Ass'n of Machinists*, 254 N.L.R.B. 282, 284 (1981) (union picketers threatened to kill replacements); *Brotherhood of Railway Carmen, Local Union No. 543*, 248 N.L.R.B. 285, 288 (1980) (union agents followed replacement home from work and told him that his arms and legs would be broken if he continued to work).

[20] *See, e.g., Bickerstaff Clay*, 871 F.2d at 986-92 (finding "a pervasive atmosphere of violence" against replacements "ranging from a shotgun blast into the home of an employee to slashed tires"); *Randle-Eastern*, 584 F.2d at 728; *I T Services*, 263 N.L.R.B. at 1187-88 (union picket captains and other picketers engaged in "pervasive" campaign of "violence and intimidation" against replacements); *District 34, Int'l Ass'n of Machinists*, 254 N.L.R.B. at 285 (elderly replacement assaulted by picketer); *Pennco, Inc.*, 250 N.L.R.B. 716, 718 n.16 (1980), *enf'd*, 684 F.2d 340, 342 (6th Cir.), *cert. denied*, 459 U.S. 994 (1982); New York Times, June 8, 1988, at B-1, col. 2 (boats piloted by replacements "were shot at as they passed under bridges"): S. Estreicher, *Strikers and Replacements*, 38 Lab. L.J. 287 (1987) (much picket line violence "is a product of, or response to, the hiring of replacement workers").

[21] *See, e.g., Johns-Manville Sales Corp., supra*, 289 N.L.R.B. No. 40, at 6 (seventy replacements' cars "sustained some combination of smashed windows, slashed tires, or body damage"); *Maine Town's Quiet Shattered by Strike*, New York Times, July 26, 1987, at 2, col. 1 (house believed to belong to replacement "firebombed

quently demand that replacements be fired.[22] And union representatives often force replacements to endure taunts, threats of termination, obscenities and other abuse in crossing a picket line to get to work.[23] The depth of the "enmity[] extends far beyond the picket lines," turning "brother against brother" in a manner that " '[s]ounds like the Civil War.' " *Town Tainted by Bitterness Over Yearlong Mine Strike*, New York Times, June 30, 1986, at B-1, col. 2.

The depth of the hostility unions feel to striker replacements does not end when a strike ends. Indeed, in one mill-town, descendants of replacements who crossed a picket line in 1921 "are still known as sons of scabs."[24] In short, the Board's non-presumption presumption leads to as improbable a result as presuming that chickens desire exclusive representation by foxes. *See Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 750 (1981).

The absurdity of the Board's treatment of permanent striker replacements is also evident in comparing it to its treatment of strikers. Curiously, the Board does pre-

and the word 'scab' was written on the outside"); *Town Tainted by Bitterness Over Yearlong Mine Strike*, New York Times, June 30, 1986, at B-1, col. 2 ("Tires have been deflated and car windows have been broken"); New York Times, Oct. 12, 1988, at A-14, col. 1 (replacement's "car vandalized").

[22] *See, e.g., Randle-Eastern*, 584 F.2d at 728; *Dold Foods, supra*, 289 N.L.R.B. No. 156, at 9 (union's "main argument" at bargaining table was that employer should discharge sufficient replacements to make room for strikers; replacements knew of this demand); *Johns-Manville Sales Corp., supra*, 289 N.L.R.B. No. 40, at 3.

[23] *See, e.g.*, New York Times, Feb. 1, 1986, at 54, col. 1 (strikers "taunted workers attempting to enter"); New York Times, Oct. 12, 1988 at A-14, col. 1 (replacements "showered with insults").

[24] *Paper Mill Strike Ends, But the Anger Remains*, New York Times, Oct. 12, 1988, at A-14, col. 1.

sume from the fact that an employee participates in a strike that the employee supports the union, but refuses to draw the opposite presumption when a replacement refuses to participate in a strike. *See, e.g., United Union of Roofers*, 296 N.L.R.B. No. 83, at 10 (1989). Moreover, the Board applies its *Buckley/KKHI* approach to permanent replacements without regard to the length of the strike. *See, e.g., Glover Bottled Gas Corp., supra* (Board presumes replacements want union representation despite two year strike). In contrast, Section 9(c)(3) of the NLRA declares economic strikers not reinstated one year after commencement of an economic strike to be ineligible to vote. 29 U.S.C. § 159(c)(3). Even after this one-year period has run, the Board would still require an employer to produce evidence of objective considerations of non-union support in a unit comprised entirely of permanent replacements. But after the one-year period has run, there is no union representational interest in strikers that would warrant Board protection; the sole focus should be on the desires of the replacement work force.

Even the AFL-CIO concedes that a replacement's crossing of a picket line signals that it is "less likely" that the replacement desires union representation. (AFL-CIO Br. at 6-7 n.5) The Board's approach assumes the opposite. Thus, it fails to comport with common sense or this Court's insistence that presumptions reflect the most probable outcome.[25]

[25] *See Bickerstaff Clay*, 871 F.2d at 992 ("common sense dictates that it is highly unlikely that a replacement worker supports the union if the union is negotiating for his discharge and he crosses a picket line, violent or not, to report to work each day").

2. *Only the Non-Representational Presumption Corrects the Unavailability of Evidence to Employers and Reflects the Ready Availability of Evidence to Striking Unions.*

Courts also test the rationality of a presumption by judging whether it "correct[s] an imbalance resulting from one party's superior access to proof." E. Cleary, *supra* § 343 at 968. Again, only the presumption that permanent replacements do not desire representation by the striking union satisfies this requirement. As discussed below, employers are hamstrung and face enormous obstacles to ascertaining whether or not replacements want union representation; in contrast, unions face no such obstacles and are likely to have proof of any desire for union representation in those few instances where replacements may have that preference. Thus, the non-representational presumption, which places the burden on the union of coming forward with evidence that replacements want union representation, corrects an imbalance of proof; the Board's non-presumption presumption only exacerbates that imbalance.

Employers face severe restrictions on their ability to gather evidence of the representational desires of replacements. The Board holds that an employer may not poll its employees to determine if a union has lost its majority status unless the employer first has evidence of objective considerations showing that a majority of employees rejects the incumbent union[26]—an absurd Catch-22 rule that has been repeatedly rejected by the federal courts of appeals.[27] Similarly, an employer cannot question indi-

[26] *See, e.g., Roanwell Corp.* 293 N.L.R.B. No. 3, at 1-2 (Feb. 28, 1989).

[27] *See Mingtree Restaurant, Inc. v. NLRB*, 736 F.2d 1295, 1297 (9th Cir. 1984) ("By the Board's reasoning, an employer in doubt of a union's majority status would be allowed to take a poll only when it had no actual need to do so, that is, when it already had sufficient objective evidence to justify withdrawal of recognition."); *Thomas Industries, Inc. v. NLRB*, 687 F.2d 863, 867 (6th Cir.

vidual employees or strike replacements about their representational desires without running a serious risk that the Board will find an unfair labor practice.[28] Nor can

1982) (finding "Board's position to be untenable"); *NLRB v. A. W. Thompson, Inc.*, 651 F.2d 1141, 1145 (5th Cir. 1981) (Board's requirements for employer polling rejected as tantamount to an outright ban).

Despite the courts' repeated rejections of the Board's approach, the Board stubbornly continues to adhere to its view that the "standard for employer polling is the same" as the standard for withdrawal of recognition. *See Texas Petrochemicals Corp.*, 296 N.L.R.B. No. 136, at 10 (Sept. 29, 1989). The Board has conceded that "this similarity does present what at first blush appears to be the anomaly that an employer cannot conduct a poll until it has acquired sufficient evidence to make a poll unnecessary, i.e., sufficient evidence to withdraw recognition, without 'need' for a poll." *Id.*

[28] Whether and when employees can be questioned by an employer remains a murky area of Board law. *See Rossmore House*, 269 N.L.R.B. 1176 (1984), *affirmed*, 760 F.2d 1006 (9th Cir. 1955) (overruling *PPG Industries*, 251 N.L.R.B. 1146 (1980)). Avowed union supporters apparently can be engaged in an uncoercive dialogue concerning the basis for their union sympathies, but there is no need to inquire whether avowed union supporters support the union. While the Board apepars to permit uncoercive inquiries about the *basis* for employee's union support, recent Board cases appear to forbid inquiries into *whether* employees support a union. *See Keystone Lamp Mfg. Corp.*, 284 N.L.R.B. No. 74 (June 30, 1987); *Morgan Services, Inc.*, 284 N.L.R.B. No. 95 (1987). To determine whether employer questioning is coercive and thus violative of Section 8(a)(1), the Board applies "a case-by-case analysis which takes into account the circumstances surrounding an alleged interrogation . . ." *Sunnyvale*, 277 N.L.R.B. 1217 (1985); *Morgan Services, Inc., supra.*

At the very least, then, the legality of employer inquiries concerning the union sympathies of individual employees individually or collectively is unclear at best. Even more important for purposes here, under the Board's "blocking charge" rules, an NLRB election —even one requested by striker replacements—would be blocked for months or even years while the Board applies its "case-by-case analysis" to all of the circumstances surrounding an alleged interrogation. The "blocking charge" rules create the same delays where an employer uses polling or some other non-coercive means of ascertaining replacements' representational desires.

an employer circulate or instigate a petition as a means of ascertaining whether replacements want union representation.[29]

Striking unions face none of these restrictions. "In contrast to the many decisions outlawing systematic interrogation by employers, it is clear that there is no such rule barring interrogation by unions . . ." Gorman, *Labor Law* at 176 (1976). Unions are also free to poll replacements to determine the extent of union support. *Id.*

In light of this disparate access to proof, the non-representational presumption applied by the Board for a quarter of a century is the only sensible one: It alone makes it easier for the party lacking access to relevant evidence—the employer—to vindicate its position while placing the burden of going forward on the party which is most likely to have such evidence. Indeed, the Board itself recognized as much more than thirty years ago in logic that is just as compelling today. "Proof of majority is peculiarly within the special competence of the union . . . An employer can hardly prove that a union no longer represents a majority since he does not have access to the union's membership lists and direct interrogation of employees would probably be unlawful as well as of dubious validity." *Stoner Rubber Co.*, 123 N.L.R.B. 1440,

[29] 1 C. Morris, *The Developing Labor Law*, § 13 at 605 (1983).

Employer election petitions to test the representational status of incumbent unions are dismissed out of hand by the Board in the absence of the very kinds of "objective considerations" required to establish loss of majority support. *See Texas Petrochemicals Corp. supra*, 296 N.L.R.B. No. 136, at 16 n.25. Thus, any argument that the employer here, Curtin Matheson, could have filed an election petition to test the union sympathies of its largely replacement workforce truly begs the question. If in the Board's view, Curtin Matheson had no basis for withdrawing recognition from the Union, the same lack of proof of non-support would have caused the Board to dismiss any election petition Curtin Matheson might have filed. The law does not require futile acts.

1445 (1959). Applying that reasoning, the *Stoner* Board held that an employer's production of evidence that half the workforce was made up of striker replacements was sufficient to shift the employer's initial burden to the General Counsel: "The presumption [of continuing majority support] then loses its force and the General Counsel [and the Union] must come forward with *evidence* that on the refusal-to-bargain date the union in fact did represent a majority of employees . . ." *Id.* (emphasis in original).

3. *Only the Non-Representational Presumption is Consistent with the National Labor Relations Act.*

The presumption that permanent replacements do not desire exclusive representation by the striking union is also the only one that satisfies the last requirement for upholding an NLRB presumption: consistency with the National Labor Relations Act. *See Baptist Hospital*, 442 U.S. at 787.

Central to the statutory scheme of the NLRA is Section 7. That section guarantees all employees the fundamental right to make their own representational choice: employees may elect to "form, join, or assist labor organizations, [and] to bargain collectively through representatives of their own choosing;" but employees also have the equally fundamental right to elect "*to refrain* from any or all of such activities." 29 U.S.C. § 157 (emphasis supplied). This guarantee is enforced by the requirement of Section 9 that unions must be "designated or selected . . . by the majority of employees" to serve as the employee's representative. 29 U.S.C. § 159. Moreover, the Section 7 right to refrain from representation by a union is also protected by Section 8(b)(1)(A), which makes it an unfair labor practice to "restrain or coerce employees in the exercise of the rights guaranteed" in Section 7.

Applying these provisions, this Court has repeatedly recognized the right of employees to opt against union

representation. Most recently, in *Pattern Makers League v. NLRB*, 473 U.S. 95 (1985), this Court struck down a provision of a union's constitution forbidding resignations during a strike as a violation of the Section 7 right to refrain from concerted activity. Similarly, in *Booster Lodge No. 405 v. NLRB*, 412 U.S. 84 (1973), this Court held that a union violates Section 8(b)(1)(A) by fining an employee who resigned from a union for crossing a picket line. As this Court recognized, "freedom of choice and majority rule in employee selection of representatives" is "the premise of the Act." *International Ladies' Garment Workers' Union v. NLRB*, 366 U.S. 731, 738-39 (1961).

The Board has also recognized that a union's institutional interests "simply cannot negate or otherwise overcome fundamental Section 7 rights" to refrain from union activities. *International Ass'n of Machinists, Local Lodge 1414*, 270 N.L.R.B. 1330, 1334 (1984). Thus, the Board has held that any restrictions on resignations from a union are an "unlawful" violation of the right "to refrain from union or other concerted activities." *Id.* Likewise the Board has held that because the "principle of majority rule" is "central to the framework" of the NLRA, it cannot impose union representation on a group of employees—even where the employer commits "pervasive" unfair labor practices—in the absence of evidence that the Union has majority support. *Gourmet Foods, Inc.*, 270 N.L.R.B. 578 (1984).

The Board's non-presumption presumption would violate the fundamental right to refrain from having union representation and the corollary principle of majority rule. Under the Board's approach, even where replacements are a majority of the unit, the replacements—whose one contact with the Union is to reject and weaken its strike by working and by permanently displacing strikers—become virtually locked into union representation and are easily foreclosed from exercising their right to elect against union representation. As this Court has

previously recognized, "[t]here could be no clearer abridgement of § 7 of the Act, assuring employees the right 'to bargain collectively through representatives of their own choosing' or 'to refrain from' such activity" than to impress a union upon a "nonconsenting majority." *International Ladies' Garment Workers' Union*, 366 U.S. at 737 (footnote omitted). All of the available evidence concerning the real world desires of striker replacements indicates that the Board's non-presumption presumption does just that. (*See supra* Part I.B.1.)

Nor can this violation of permanent striker replacements' Section 7 rights somehow be cured by replacements' filing of a decertification petition. Under the Board's contract bar rule, such petitions are barred for up to three years anytime a striking union does what the striking union did in this case: accepts an employer's final pre-strike offer. *See, e.g., Millbrook, Inc.*, 204 N.L.R.B. 1148 (1973); *General Cable Corp.*, 139 N.L.R.B. 1123 (1962). The practical result is that replacements are rendered "unable to exercise their right to choose a representative for many years hence." *Peoples Gas Systems, Inc. v. NLRB*, 629 F.2d 35, 45 n.17 (D.C. Cir. 1980). Striking unions frequently accept such pre-strike offers to preserve their representational status where, as here, they find that an economic strike has been unsuccessful. Striker replacements have no control over whether a striking union will create such a bar by accepting a pre-strike offer. In addition, if the employer's pre-strike offer contained a union security clause, striker replacements may find themselves compelled to pay union dues for the duration of any agreement or forfeit their jobs.

Moreover, Sections 8(a)(1) and (2) of the NLRA make it unlawful for an employer to recognize and bargain with a union that does not represent a majority of its employees. *See International Ladies' Garment Workers' Union*, 366 U.S. at 738. This unfair labor practice is not dependent upon an employer's good faith belief that a union represents a majority or upon the filing of a decertification petition. *Id.* at 737 n.8.

C. The Board's Non-Presumption Presumption Is Not Entitled to Any Deference.

In an effort to avoid scrutiny of its adoption of an approach that is both irrational and inconsistent with the NLRA, the Board asks this Court to "defer" to its judgment. But deference is neither required nor appropriate here.

First, an agency's decision is not entitled to any deference where, as here, it fails to reconcile a conflict with its own precedents.[30] The Board's freedom to change its mind does not afford it a license to simultaneously advance conflicting positions.

The Board's promulgation of its non-presumption presumption in *Buckley/KKHI* and its application in the case at bar violate this principle. There is simply no way to reconcile the Board's position in these cases with the rule and reasoning that the Board previously announced in *Service Electric Co.*, 281 N.L.R.B. No. 633 (1986) and *Leveld Wholesale, Inc.*, 218 N.L.R.B. 1344 (1975). If, as the Board concluded in *Service Electric* and *Leveld*, a striking union's conflict of interests with striker replacements makes it logically impossible for the

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[30] *See, e.g., Atchison, Topeka & Santa Fe Railway Co. v. Wichita Board of Trade*, 412 U.S. 800, 808 (1973); *United Food & Commercial Workers v. NLRB*, 880 F.2d 1422, 1437 (D.C. Cir. 1989) (reversing Board for "failure to explain how it could reconcile the results that it approved in this case with the results contained in [other] Board decisions"); *New York Council, Ass'n of Civil Technicians v. FLRA*, 757 F.2d 502, 510 (2d Cir.), *cert. denied*, 474 U.S. 846 (1985); *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir.) ("[I]f an agency glosses over or swerves from prior precedents without discussion it may cross the line from the tolerably terse to the intolerably mute"), *cert. denied*, 403 U.S. 923 (1971).

union to fairly and vigorously represent striker replacements, it cannot presume that striker replacements would want such union representation. No rational striker replacement would want to be represented by an institution whose interests so obviously diverge from his own.

The Board has never attempted to explain this contradiction between its new non-presumption presumption and its settled precedent. Instead, both *Buckley/KKHI* and the Board's opinion in the case at bar are silent on this inconsistency.

Second, the theories offered by the Board in support of its non-presumption presumption present the kinds of speculation that this Court has previously held are either entitled to no deference or utterly impermissible. Thus, the Board's lawyers argue in this Court that its rule is needed to promote stability. But nowhere in either *Buckley/KKHI* or the Board decision in this case did the Board itself ever rely on this theory. Nor, despite the musings of Board counsel, has the Board *ever* made any findings that employers misused the Gorman presumption to oust incumbent unions during the twenty-five years when it was the law of the Board. There was no discussion of any such employer abuse in either the Board's *Buckley/KKHI* decision (Pet. App. 75a) or in the decision announcing the initial change in Board policy by adopting the presumption of union adherence. *See Windham Community Hospital*, 230 N.L.R.B. at 1070.[31] As this Court

[31] Indeed, all evidence is that there is no danger that employers will abuse the non-representational presumption. Thus, the Board's brief identifies only one case in the twenty-five year period when the Board applied that presumption where an employer sought to abuse the Gorman presumption; the Chamber has likewise been unable to identify any other such case in that period. *See* Pet. Br. at 21 n.10 (citing *Laher Spring & Elec. Car Corp.*, 192 N.L.R.B. 464 (1971).

Moreover, as the *Laher* case illustrates, unfair labor practice procedures exist to deal with an employer who connives to under-

has repeatedly held, "courts may not accept appellate counsel's post hoc rationalization for agency action." *See Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 50 (1983).

The Board's rationalization that adoption of the Gorman presumption "would disrupt the balance of competing economic weapons" (Pet. App. 75a-76a) is likewise entitled to no deference as it presents yet another attempt by the Board to usurp for itself powers this Court has repeatedly held it does not have. As the Court first held in *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477, 497 (1960), the Board has no business acting "as an arbiter of the sort of economic weapons the parties can use . . . ." Federal labor law does not "contain a charter for the National Labor Relations Board to act at large in equalizing disparities of bargaining power between employer and union." *Id.* at 490. As the court noted in *American Ship Building Co. v. NLRB*, 380 U.S. 300, 310 (1965), the NLRA's "provisions are not indefinitely elastic, content-free forms to be shaped in whatever means the Board might think best conforms to the proper balance of bargaining power." Instead, Congress contemplated a system where the Board has no authority to interfere with the use of economic weapons. *Id.* at 316.[32]

In any event, even if this was a case where judicial review was properly limited by notions of deference, the Board's non-presumption presumption would still have to

mine a union's representational status by packing the workforce with replacements. No such unlawful conduct was alleged here. Instead, the Fifth Circuit expressly found that the number of replacements legitimately hired matched the number needed. (Pet. App. 3a).

[32] Significantly, the Board's brief cites no authority for its claimed power to engage in such balancing of economic weapons. *See* Pet. Br. at 25. The Board has conceded in other decisions that it lacks such authority, but refuses to recognize that limitation here. *See Harter Equip., Inc.*, 280 N.L.R.B. 597, 600 (1986), *aff'd*, 829 F.2d 458 (3d Cir. 1987).

be set aside. "Deference to the Board 'cannot be allowed to slip into a judicial inertia' . . ." *NLRB v. Financial Institution Employees*, 475 U.S. 192, 202 (1985) (quoting *American Ship Building*, 380 U.S. at 318). As shown in Part I.B. *supra*, the Board's non-presumption presumption is neither rational nor consistent with Board precedent or the NLRA. Thus, it must be set aside even if the Court's review is limited to ascertaining its reasonableness.

II. IN ANY EVENT, EVEN IF THE BOARD WERE CORRECT THAT NO UNIVERSAL GENERALIZATION ABOUT REPLACEMENTS IS POSSIBLE, IT REACHED A STATUTORILY IMPERMISSIBLE RESULT BY NOT RESOLVING THE QUESTION CONCERNING REPRESENTATION IN AN ELECTION UNDER SECTION 9 OF THE NLRA.

Central to the Board's defense of its non-presumption presumption is its claim that it can "discern no overriding generalization about the views held by strike replacements . . ." (Pet. App. 76a). As discussed in Part I.B.1., that finding is inconsistent with the overwhelming evidence that permanent strike replacements are unlikely to want to be represented by a striking union. But even if the Board acted rationally in refusing, as an empirical matter, to make such a generalization, its conclusion—that employers whose workforces contain majorities of striker replacements commit unfair labor practices by not bargaining with a striking union—reaches a statutorily impermissible result.

In essence, the Board's position in this Court is that it does not know what strike replacements want: the Board recognizes that "incumbent unions and strikers have sometimes shown hostility toward the permanent replacements . . ." (Pet. App. 74a). It likewise concedes that attitudes are likely to be influenced by their knowledge of the "union's primary concern for the striker's welfare, rather than that of the replacements." (Pet. App. 75a). Nevertheless, it believes that replacements "may" cross a picket line but still want union representation. (Pet. Br. at 17-18; Pet. App. 75a). The Board's difficulty in making a generalization, it reports, is compounded by the fact that the sentiments of employees "are in a state of flux" during and after a strike. (Pet. Br. at 22).

If the Board, with all its experience, cannot be sure whether strike replacements want union representation, then it must be that there is a question concerning representation where, as here, a majority of employees are replacements. Under the Act, when a "question of representation" exists it is the Board's duty to "investigate," "provide for an appropriate hearing," and "direct an election by secret ballot." 29 U.S.C. § 159(c).

But if the employer here had filed an election petition premised on its hiring of replacements, the petition would have been dismissed for lack of objective evidence of union non-support. Instead, the General Counsel would have and did opt to resolve the question concerning the representation of the striker replacements in an unfair labor practice proceeding which altogether denies them the right to vote in a Board election. *See Proxy Communications of Manhattan, Inc., supra*, 290 N.L.R.B. No. 68, at 3, n.3. Because the Board shirks its responsibility to conduct elections under Section 9 of the Act, the only means available to an employer for resolving whether a group of replacements want union representation as the Board administers the NLRA is to withdraw recognition and defend against the inevitable unfair labor practice charge. That route, however, places the entire burden on the employer for guessing the result of the hiring of a substantially different workforce—a particularly harsh result since the Board on the one hand acknowledges its uncertainty that replacements want union representation and on the other hand denies employers the opportunity to resolve that uncertainty by other non-coercive means such as polling. *See supra* Part I.B.2.

Equally importantly, while resulting unfair labor practice cases are being fought out, the desires of striker replacements, which are easily ascertainable through the Board ballot box, are ignored. This case is a perfect example. It arose in 1979. To this day, no attempt by the Board or the Union has been made to ascertain the representational desires of the lawfully hired permanent replacements. Instead, the Board has chosen to litigate for more than ten years its imposition of a presumption that is inconsistent with logic, reported Board precedent and the fundamental principle of the NLRA. In its zeal to preserve the union's representational status, the Board has failed to ascertain the representational desires of the replacement workers here about which the Board concedes it is impossible to generalize.

The Board's refusal to consider petitions for election from employers in this context fails to recognize that, as the AFL-CIO concedes in its brief, elections are the route contemplated by the NLRA to resolve whether replacements and other employees want union representation. (*See* AFL-CIO Br. at 2.) As this Court noted in *Linden Lumber Division v. NLRB*, 419 U.S. 301 (1974), Board-conducted secret ballots are also the most accurate and expeditious method of ascertaining employees' representational preferences.[33]

This Court should not sanction the Board's refusal to meet its responsibilities for conducting elections as required by Section 9. The Board's refusal to follow this NLRA directive is all too reminiscent of *NLRB v. Radio*

[33] There is no reason why Board elections in this context should result in inordinate delays. For example, the scope and composition of the bargaining unit would normally be known. And, nothing prevents the Board from establishing expedited election procedures for determining the representational desires of striker replacements. Instead of establishing a procedure for expediting these determinations, the Board has established a presumption that is contrary to common sense and the Act's basic tenets.

& Television Broadcast Engineers Union, Local 1212 (*"CBS"*), 364 U.S. 573 (1961). In that case, the Board had refused to decide which of two conflicting unions was entitled to perform work that each union was claiming in a jurisdictional dispute. This Court held that Section 10(k) of the NLRA, which empowers the Board to conduct hearings to resolve such disputes, "requires the Board to decide jurisdictional disputes on their merits . . ." *Id.* at 579.[34] As in *CBS*, here the Board refuses to take action mandated by the NLRA—in this case, meet its Section 9(c) responsibility to "investigate," "provide for an appropriate hearing," and "direct an election by secret ballot" to decide questions concerning representation. As in *CBS*, this Court should hold that the Board must comply with the congressional mandate.

In sum, even if there is enough uncertainty about replacements' preferences to bar application of the Gorman presumption, the Board has failed to take the path contemplated by the NLRA. Rather than exposing replacements to loss of their Section 7 rights and employers to unfair labor practice charges, the Board should live up to its responsibility for conducting elections to resolve such questions. Having failed to do so here, its decision should be set aside.

CONCLUSION

For all the foregoing reasons, the Fifth Circuit's decision rejecting the Board's absurd and unlawful non-presumption presumption should be affirmed.

[34] As the Court reasoned "[t]he words 'hear and determine the dispute' convey not only the idea of hearings but also the idea of deciding [the] controversy." *Id.* at 579. And because "Congress after discussion and consideration, decided to intrust this decision to the Board," the Court mandated that the Board exercise its authority and resolve the jurisdictional dispute. *Id.* at 583.

Respectfully submitted,

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